14-2378-cr

United States Court of Appeals
for the
Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

DIDIER GERSON RIOS GALINDO, AKA Sealed Defendant 1,
AKA El Nenguere, AKA Marcos Rios, AKA Chavelin,

Defendant,

YESID RIOS SUAREZ, AKA Sealed Defendant 2,
AKA El Enano,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

Appellant Yesid Rios Suarez appeals from a final judgment disposing of all charges against him entered by the United States District Court for the Southern District of New York on June 27, 2014. *United States v. Rios Suarez*, 11-CR-836 (KBF).[1] Rios Suarez, who pled guilty to the Indictment, filed a timely notice of appeal concerning the sentence imposed on July 1, 2014.[2] The district court had jurisdiction pursuant to 18 U.S.C. §§ 3231 and 3238. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the government's withdrawal of the negotiated plea agreement before Mr. Rios Suarez had an opportunity to consider it with the effective assistance of counsel violated Mr. Rios Suarez's Fifth and Sixth Amendment rights?

II. Whether this case should be remanded for resentencing because the district court's 648-month sentence (A) violated the Colombian extradition order pursuant to which Mr. Rios Suarez was subject to the jurisdiction of the district court and (B) was substantively unreasonable and an abuse of discretion?

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[1] A-505-509 (judgment) and A-14-18 (indictment). Citations prefaced by "A" refer to the page number in Appellant's Joint Appendix.
[2] A-510.

III. Whether the one million dollar fine imposed was constitutionally excessive?

STATEMENT OF THE CASE

Mr. Rios Suarez is a citizen of Colombia. As such, he was entitled to the benefit of the protections conferred by the laws of Colombia as detailed in the extradition order pursuant to which he was brought to the United States to face the charges in the filed indictment in *United States v. Rios Suarez,* 11-CR-836 (KBF)[3], and subject to the jurisdiction of the district court. Those protections included, among others, that Mr. Rios Suarez would have the right to the assistance of counsel at all stages during the proceedings against him, that a sentence of life imprisonment would not be imposed, that he would receive credit for the time spent awaiting extradition, and that the penalty imposed would not be out of proportion.[4] Each of those rights was violated during the course of the proceedings in the district court.

First, Mr. Rios Suarez was denied the effective assistance of counsel and due process of law during plea negotiations because even though the government was aware that communications had broken down between Mr. Rios Suarez and his former attorney, the government refused to extend the deadline for Mr. Rios Suarez to accept the plea after new counsel was appointed. Therefore, Mr. Rios

[3] A-14-18.
[4] A-369-382 at A-371.

Suarez was unable to evaluate the plea offer with the assistance of competent counsel as mandated by the Supreme Court.

Second, at sentencing, the district court imposed a 648-month (54-year) sentence, effectively guaranteeing that Mr. Rios Suarez, who was 46 years old at the time of sentencing, would die in a federal prison. This sentence violated the Colombian extradition order's prohibition on a sentence of life imprisonment and its mandate that Mr. Rios Suarez was entitled to receive credit for the time spent awaiting extradition.

Third, the one million dollar fine imposed on Mr. Rios Suarez was constitutionally excessive and out of proportion.

Therefore, the case should be remanded for resentencing pursuant to the terms of the negotiated plea agreement and with full deference to the Colombian extradition order. The factual basis for this appeal is as follows:

I. The Colombian Conviction

On September 16, 2010, Mr. Rios Suarez was convicted *in absentia* in Colombia of drug manufacturing and trafficking and sentenced to 200 months of imprisonment. Mr. Rios Suarez was in Venezuela during those proceedings.

On September 19, 2011, Mr. Rios Suarez was extradited from Venezuela to Colombia. On December 19, 2011, the sentence was reduced to 100 months of imprisonment based on the appellate court's recalculation of the applicable drug quantity. While he was serving that sentence, on February 1, 2012, he was notified that he would be extradited to the United States to face the indictment in this case.[5] On information and belief, Mr. Rios Suarez will serve the remaining portion of that 100-month sentence upon his return to Colombia.

The cases in Colombia and in the district court were factually closely related, differing only in timeframe. As in the instant matter, the Colombian government alleged that Mr. Rios Suarez had conspired to manufacture and transport cocaine out of the country through the use of small aircraft and clandestine landing strips.[6] The Colombian court noted the FARC's involvement in the infrastructure of the conspiracy but did not determine that Mr. Rios Suarez was a member of the FARC. In this case, the government alleged that Mr. Rios Suarez had been involved with, but not a member of, the FARC.[7] On information and belief, cooperating witness Yon Pelayo Garzon Garzon testified against Mr. Rios Suarez in that proceeding about some of the same facts to which he later testified before the district court at the *Fatico* hearing. Nonetheless, the Colombian court approved Mr. Rios Suarez' extradition and held that the Southern

[5] A-402.
[6] Counsel has been unable to obtain documentation concerning this case other than the facts cited in the Colombian resolutions reproduced in the Joint Appendix at A-369-382. Facts alleged "on information and belief" are based on information from Mr. Rios Suarez' Colombian attorney.
[7] A-492.

District prosecution would not constitute double jeopardy based on the dates of the alleged activity.[8]

II. Extradition to the United States

In 2011, Mr. Rios Suarez was charged in the Southern District of New York with violations of federal law including, principally, conspiracy to manufacture and import five kilograms and more of cocaine into the United States in violation of 21 U.S.C. § 963.[9] The government alleged that he had been involved in the clandestine manufacturing of cocaine and the importation of that cocaine into the United States through the use of hidden landing strips and small aircraft.[10] On April 25, 2013, Mr. Rios Suarez, who had never before set foot in the United States, was extradited to the Southern District of New York pursuant to an extradition order from the Colombian Government. The conditions of extradition were detailed in the Colombian Government's Resolutions 382 and 453, dated October 2, 2012, and December 14, 2012, respectively.[11]

The Resolutions recognized that Mr. Rios Suarez could be prosecuted only for "acts committed after December 17, 1997," specifically for the charged conspiracy to "(a) import five kilograms or more of cocaine to the United States, and (b) manufacture and distribute five kilograms or more of cocaine with the knowledge that said substance would be imported to the United States," as charged in the district court's indictment.[12] Resolution 382 instructed that, "the [Colombian] Government should make it a condition of delivery that the person required in extradition **may not** be sentenced to death nor tried for acts other than those that motivate extradition, no[r] subjected to . . . life imprisonment . . ." and that recognized due process guarantees should apply."[13] Those due process guarantees included the right to "have the Counsel appointed by himself or the State, that he be given appropriate time and means to prepare his defence [*sic*], . . . that the penalty eventually imposed upon him may not be out of proportion, . . . and that the sentenced [*sic*] to imprisonment . . . have the essential purpose of reform and social adaptation."[14]

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[8] A-378-379.
[9] A-14-15.
[10] A-15-16.
[11] See A-369-375 (Resolution 382) and A-376-382 (Resolution 453 [affirming Resolution 382]).

On January 31, 2014, after Mr. Rios Suarez's extradition but before his plea of guilty, the Consulate of Colombia sent a letter to the district court with copies to counsel restating the terms of the extradition order, in which the Colombian court permitted Mr. Rios Suarez's extradition only on the condition that "a sentence of

[12] A-376 at ¶ 1.
[13] A-370-371 at ¶ 6 (citing the decision of the Criminal Cassation Division of the Supreme Court of Justice dated September 19, 2012)) (emphasis supplied).
[14] A-371.

life imprisonment **will not** be sought or imposed"[15] (emphasis supplied) and that he "will not be subject to forced disappearance, torture or cruel and unusual punishment, degrading or inhumane treatment, or exile."[16]

III. Plea Negotiations

In or about early January 2014, the government offered a plea agreement to Mr. Rios Suarez through his former counsel in this matter.[17] The plea agreement proposed a base offense level of 38 for "more than 150 kilograms of cocaine," and offered Mr. Rios Suarez a stipulated sentencing range of 168-210 months and what would have been an effective sentencing range of 135-168 months.[18]

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[15] A-366. Based on the text of the Colombian Resolutions, the district court erred at the plea hearing in stating that, "while the government may not, pursuant to treaty, seek a life sentence for you, that does not prevent the Court from imposing a life sentence on you." A-54, ln. 10-13.

[16] A-366.

[17] See A-392-396. The proposed plea agreement is dated January __, 2014 and is addressed to Mr. Rios Suarez's former counsel, whose handwriting evidencing the negotiations between the parties is visible on the document.

[18] The proposed plea calculation, edited to reflect the additional 2-point enhancement approved by the Sentencing Commission—offense level 33, Criminal History Category I (no enhancements):

Base Offense Level (U.S.S.G. § 2D1.1(c)(1)) (more than150 kilograms of cocaine)	38
Acceptance of Responsibility (U.S.S.G. §3E1.1)	-3
New 2014 Guidelines 2-point reduction for drug sentences (see www.ussc.org)	-2
TOTAL OFFENSE LEVEL	**33**

The deadline for acceptance of the plea agreement was January 7, 2014. On January 5, 2014, the undersigned was contacted for a substitution of counsel, at which time all relevant individuals were aware that communication between Mr. Rios Suarez and his prior attorney had broken down and that he was effectively without the advice of counsel at this critical moment.[19]

On January 7, 2014, the parties appeared before the district court for the substitution of counsel hearing. During the hearing, the government stated that the

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Under the proposed Sentencing Commission amendments to the Guidelines, a level 38 would apply to offenses involving "more than 450 kilograms of cocaine" and a level 36 would apply to offenses involving "at least 150 kilograms but less than 450 kilograms of cocaine." See Proposed Guidelines Amendments at p. 13, available at http://www.ussc.gov/sites/default/files/pdf/amendment-process/official-text-amendments/20140430_Amendments.pdf. Because the negotiated plea agreement referenced 150 kilograms of cocaine, a base offense level of 36 would have been an appropriate starting point for the district court's calculation of the appropriate Guidelines range. The plea agreement did not include this 2-point reduction, leading to a Guidelines level of 35 and a range of 168-210 months. However, because Mr. Rios Suarez would have been entitled to a 2-point reduction in anticipation of the Sentencing Commission's across-the-board narcotics sentence reduction (scheduled to go into effect as of November 1, 2014) as per the instruction of Attorney General Eric Holder (*see* "Attorney General Holder Urges Changes in Federal Sentencing Guidelines to Reserve Harshest Penalties for Most Serious Drug Traffickers," Dep't of Justice News Release, March 13, 2014, available at *http://www.justice.gov/opa/pr/2014/March/14-ag-263.html*), the defense argued at sentencing that his sentencing level should be 33, with a range of 135-168 months.

[19] Although the undersigned does not question that Mr. Rios Suarez' former counsel provided competent representation (see A-21 at ln. 24-25, A-22 at ln. 1-20, A-477 at ln. 16-17), Mr. Rios Suarez' inability to communicate with her effectively nonetheless deprived him of the assistance of counsel to which he was entitled as he decided whether or not to plead guilty.

plea offer was scheduled to expire that day. Based on informal discussions with the government before the hearing, defense counsel understood that the deadline would nonetheless be extended in order to give new counsel an opportunity to discuss the case and the plea offer with Mr. Rios Suarez. Counsel was unaware of the details of the case and the terms of the plea agreement prior to the hearing and takes full responsibility for the fact that he was unable to ethically advise Mr. Rios Suarez to take the plea during the hearing at which he was appointed on January 7, 2014.[20]

Thereafter, counsel immediately reviewed the case and the plea offer, engaged an interpreter to assist him, and met with Mr. Rios Suarez as expeditiously as possible, on January 9 and 14, 2014, to discuss the case and the plea offer. At the conclusion of the second meeting, Mr. Rios Suarez informed counsel that he would like to accept the plea. Counsel immediately advised the government of Mr. Rios Suarez' intentions.

However, in a telephone conversation two days later, the government denied having agreed to extend the deadline so that counsel could competently and ethically advise Mr. Rios Suarez, and stated that the plea was no longer available.

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[20] Counsel respectfully notes that, had he in fact advised Mr. Rios Suarez to take the plea without being aware of the facts of the case or the evidence against Mr. Rios Suarez, Mr. Rios Suarez would have a meritorious claim that he had been deprived of the effective assistance of counsel under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984). See Argument Section I(B) below.

The government then insisted that it was not possible to re-offer the previous plea agreement or a similar agreement, and that Mr. Rios Suarez would, if he wanted to plead guilty, have to agree to a significantly higher Guidelines range as well as several enhancements that the government had previously agreed to omit.

In subsequent plea discussions, the government offered Mr. Rios Suarez an unacceptable plea agreement in which the government again asserted that the base offense level was 38 because the offense had involved more than 150 kilograms of cocaine, but sought enhancements for the use of commercial aircraft[21], firearms[22], and a managerial role[23], leading to a base offense level of 42 (after subtracting points for acceptance of responsibility) and a Guidelines range of 360 months to life imprisonment.[24] To the best of Appellant's knowledge, there was no change in circumstances other than the expiration of the prior deadline behind the government's changed position.

IV. Guilty Plea, *Fatico* Hearing, and Sentencing

On February 4, 2014, Mr. Rios Suarez pled guilty to the Indictment, which charged him with a conspiracy to import "five kilograms and more of mixtures and

[21] 2 points (U.S.S.G. § 2D1.1(b)(3))
[22] 2 points (U.S.S.G. § 2D1.1(b)(1))
[23] 3 points (U.S.S.G. § 3B1.1)
[24] *See* A-386-391, Plea Agreement addressed to present counsel, dated January 30, 2014.

substances containing a detectable amount of cocaine," in violation of 21 U.S.C. § 963.[25] Mr. Rios Suarez stated:

> I wish to plead guilty to the indictment and the allegation therein. From 1992 until September 2011, I conspired with others to import at least 5 kilos of cocaine from Col[o]mbia to the U.S., specifically, the Southern District of New York.
>
> My role in the conspiracy was to fill the planes with fuel. I knew that those planes were filled with cocaine. I knew that those planes were flying between Col[o]mbia and Venezuela. I knew that the cocaine was manufactured in laboratories in Col[o]mbia. I knew what I was doing was illegal and wrong. I am very sorry to the Court for these activities. Thank you, your Honor.[26]

On May 2 and 7, the district court held a hearing pursuant to *United States v. Fatico*, 579 F.2d 707 (2d Cir. 1978), to allow the government to attempt to prove the applicability of several Guidelines enhancements and a base offense level of 38. Mr. Rios Suarez did not testify at the *Fatico* hearing. The government offered the testimony of two cooperating witnesses, Yon Pelayo Garzon Garzon and Luis Alberto Ramirez-Pajon. The government informed the defense that the third potential witness, Sofia Cardona, was unavailable. Based on the material provided to the defense pursuant to 18 U.S.C. § 3500, Ms. Cardona would have provided significant exculpatory testimony.

On May 15, 2014, the district court agreed with the government and ruled that Guidelines level 47, which is treated as a Guidelines level 43, applied to Mr.

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[25] A-14-18.
[26] A-57 at ln. 12-23.

Rios Suarez's case.[27] The district court found that a base level of 38 was appropriate because the offense had involved more than 150 kilograms of cocaine.[28] The district court found that the government had proved, by a preponderance of the evidence, the applicability of the following enhancements:

Leader or organizer of the conspiracy (U.S.S.G. § 3B1.1(a))	+4
Criminal livelihood (U.S.S.G. § 2D1.1(b)(14)(C) and (D))	+2
Carried or caused others to carry dangerous weapons (U.S.S.G. § 2D1.1(b)(1))	+2
Unlawful importation of a controlled substance using an aircraft other than a regularly scheduled commercial carrier (U.S.S.G. § 2D1.1(b)(3))	+2
Direction of the use of violence (U.S.S.G. § 2D1.1(b)(2))	+2

The district court noted that the government did not oppose granting Mr. Rios Suarez the three-point reduction for acceptance of responsibility, leading to an offense level of 47 (an effective level of 43 pursuant to U.S.S.G. § 5A Application Note 2).[29] The defense urged the district court to reconsider its application of the above enhancements and to grant Mr. Rios Suarez the benefit of the plea agreement.[30]

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[27] A-216-222, Memorandum Decision and Order dated May 15, 2014. The district court's calculation results in a level 47, although the district court's opinion separately states that the defendant's offense level under the Guidelines is 49 (A-219), which appears to be a typographical error. In either case, a level above 43 is treated as a level 43 under U.S.S.G. § 5A Application Note 2.

[28] A-220. An amount over 150 kilograms of cocaine results in a base offense level of 38. U.S.S.G. § 2D1.1(c)(1).

[29] A-217.

At sentencing, on June 27, 2014, the district court again found that the above-listed sentencing enhancements were proper, but omitted the three-point reduction for acceptance of responsibility, leading to a Guidelines level of 50.[31] Considering Mr. Rios Suarez' argument that he had been effectively without the assistance of counsel during the critical period in which he was deciding whether to plead guilty pursuant to the offered plea agreement, the district court found the argument without merit, noting that, "even if there had been a plea agreement here and even if that plea agreement had been one which Mr. Rios Suarez had pled to, the Court always retains its own discretion to make a sentencing determination that it deems appropriate under the various factors of 3553(a)."[32] The district court stated that the government's withdrawal of the plea offer had not prejudiced Mr. Rios Suarez because "the Court would have gone through the same analysis today that it is, in fact, going to go through . . ." and that the district court "would always consider the very same enhancements that we have and we will discuss today, irrespective of the plea agreement, so the defendant is in no worse position."[33]

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[30] A-266-275.
[31] A-479 at ln. 9 to A-480 at ln. 8.
[32] A-474 at ln. 1-5.
[33] A-474 at ln. 25 to A-475 at ln. 2, A-476 at ln. 14-16. In fact, the district court erred in making this statement insofar as, had Mr. Rios pled guilty pursuant to a

The district court declined to credit Mr. Rios Suarez with the 100-month sentence to be served in Colombia, because the court could not be sure that Mr. Rios Suarez would serve that time.[34] Further, the district court declined to make a recommendation to the Bureau of Prisons concerning credit for the time that Mr. Rios Suarez had spent awaiting extradition, noting that because Mr. Rios Suarez had contested his extradition, the district court found it inappropriate to recommend credit for the time spent in those extradition proceedings.[35]

Finally, the district court considered the letter from the Colombian government and the extradition order, which provided that a sentence of life imprisonment would not be sought or imposed.[36] The district court concluded that it was not bound by the actions of a separate branch of the United States government.[37]

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plea agreement, there would have been no need for the *Fatico* hearing at which information concerning the sentencing enhancements was adduced. Moreover, the plea agreement specifically excluded enhancements, and provided for a Guidelines range of 168-210 months, the maximum of which is less than a third of the sentence ultimately imposed. See Statement of Facts, above, and Argument Section I(D)(2), below. Appellant respectfully suggests that, at a sentencing hearing following a plea pursuant to a plea agreement with a Guidelines range of 168-210 months, the district court would not have imposed a 648-month sentence.

[34] A-498 at ln. 21-23.

[35] A-501 at ln. 17 to A-502 at ln. 6.

[36] A-499 at ln. 25 to A-500 at ln. 5.

[37] A-501 at ln. 10-12.

Bearing in mind the foregoing rulings, the district court imposed a sentence of 648 months, or 54 years.[38] The district court acknowledged that the sentence was "effectively a life sentence," but stated twice that, "I am not pronouncing a life sentence."[39] Although the district court stated that it believed a 54-year sentence was "appropriate," the district court simultaneously noted that, "this defendant has the ability to appeal, and various appeals may reduce the sentence by way of enhancement reductions."[40]

SUMMARY OF THE ARGUMENT

Because of the errors at the district court level, Mr. Rios Suarez was denied the effective assistance of counsel during plea negotiations and the sentence imposed violated the Colombian extradition order pursuant to which he appeared before the district court to face the charges against him.

First, Mr. Rios Suarez was denied the effective assistance of counsel when the government declined to extend the deadline to accept the plea offer so that Mr. Rios Suarez could discuss it with his new counsel even though the government was aware that communications between Mr. Rios Suarez and his prior attorney had broken down and that Mr. Rios Suarez had been unable to evaluate the plea offer with the effective assistance of counsel. The government's conduct violated Mr.

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[38] A-502 at ln. 10-25.
[39] A-502 at ln. 19.
[40] A-502 at ln. 24, 21-23.

Rios Suarez' Sixth and Fifth Amendment rights and the district court's failure to grant Mr. Rios Suarez the benefit of the negotiated plea agreement was substantively unreasonable. Therefore, the case should be remanded for resentencing.

Second, Mr. Rios Suarez was extradited to the United States pursuant to an extradition order of the Colombian government that guaranteed Mr. Rios Suarez certain protections and with which the United States was obliged to comply. Those protections included a prohibition on a sentence of life imprisonment and a guarantee of credit for time served awaiting extradition. The district court's 648-month sentence without credit for time served violated the Colombian extradition order and the case must be remanded for resentencing.

Third, the one million dollar fine imposed on Mr. Rios Suarez was constitutionally excessive and unsupported by the record.

Therefore, the case should be remanded for resentencing at which the foregoing errors are corrected and a sentence within the range set forth in the negotiated plea agreement is imposed.

ARGUMENT

I. The Government's Withdrawal of the Plea Offer Violated Mr. Rios Suarez's Constitutional Rights.

The government's withdrawal of the plea offer on the date of the substitution of counsel hearing, after communications with Mr. Rios Suarez' prior attorney had broken down and before Mr. Rios Suarez had been able to consider the offer with the effective assistance of counsel violated Mr. Rios Suarez' Sixth and Fifth Amendment rights. The case should be remanded for resentencing before a different judge[41] during which the district court should be instructed to grant Mr. Rios Suarez the benefit of the plea agreement—a Guidelines range of 168-210 months (level 35, Criminal History Category I) and an additional two-level reduction in light of the 2014 Guidelines amendments.

A. The Reasonableness of the Government's Withdrawal of the Plea Agreement Should Be Reviewed *De Novo*.

This Court reviews "interpretations of plea agreements *de novo* and in accordance with principles of contract law." *United States v. Riera*, 298 F.3d 128, 133 (2d Cir. 2002) (quoting *United States v. Padilla*, 186 F.3d 136, 139 (2d Cir. 1999)). Despite considerable research, Appellant has not identified a case precisely on point to Mr. Rios Suarez' situation, where the government declined to extend the deadline to accept a plea offer in light of a breakdown in

[41] The request for the assignment of a new judge is based on this Court's recognition that "The effect of the government's breach of its commitment is difficult to erase if the case remains before the same judge because the judge's decision . . . was based on his assessment of the facts." *United States v. Lawlor*, 168 F.3d 633, 638 (2d Cir. 1999) (citing *United States v. Enriquez*, 42 F.3d 769, 772 (2d Cir. 1994)). If this Court finds that Mr. Rios Suarez is entitled to the benefit of the negotiated plea agreement, he should likewise be entitled to resentencing before a judge who has not heard the facts as adduced at the *Fatico* hearing and would not, therefore, "deprive the defendant of the benefit he was promised in the plea agreement." *Id.*

communications between a defendant and his attorney. However, the issues presented by this case raise questions of law that are appropriately subjected to *de novo* review. *See United States v. Thorn*, 446 F.3d 378, 387 (2d Cir. 2006) (referencing *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005)) ("We review issues of law *de novo,* issues of fact under the clearly erroneous standard, mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual, and exercises of discretion for abuse thereof.").

B. The Government's Withdrawal of the Offered Plea Violated Mr. Rios Suarez's Sixth Amendment Right to Counsel.

As the Supreme Court has long instructed, the Sixth Amendment "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done." *Gideon v. Wainwright*, 372 U.S. 335, 343, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 462, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). Among the Sixth Amendment's protections is the right to the effective assistance of counsel. U.S. CONST. AMEND. VI. Although there is no constitutional right to a plea bargain, *Weatherford v. Bursey*, 429 U.S. 545, 559, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), a defendant who has been offered a plea has the right to make a reasonably informed decision whether to accept a plea offer. *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985). In making this decision, a defendant has the right to the assistance of counsel:

> **If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it.** If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.

Lafler v. Cooper, 132 S. Ct. 1376, 1387, 182 L. Ed. 2d 398 (2012) (emphasis supplied). *See also United States v. Gordon*, 156 F.3d 376, 380 (2d Cir. 1998) (quoting *Boria v. Keane*, 99 F.3d 492, 496 (2d Cir. 1996)) (finding that an attorney breaches his duty as a criminal defense lawyer "to advise his client fully on whether a particular plea to a charge appears desirable when the attorney grossly underestimate[s] [his client's] sentencing exposure.") (internal quotations omitted).

The pretrial critical stages of a criminal prosecution "are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice." *Lafler*, 132 S. Ct. at 1388 (collecting cases). Thus, "the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences." *Lafler*, 132 S. Ct. at 1388. *See also Iowa v. Tovar*, 541 U.S. 77, 81, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004) ("entry of a guilty plea, whether to a misdemeanor or a felony charge, ranks as a 'critical stage' at which the right to counsel adheres"); *Padilla v. Kentucky*, 559 U.S. 356, 130 S.Ct. 1473, 1486, 176 L.Ed.2d 284 (2010) ("the negotiation of a plea bargain is a critical phase of litigation for purposes of the

Sixth Amendment right to effective assistance of counsel"). *See also Gordon*, 156 F.3d at 380 ("The decision whether to plead guilty or contest a criminal charge is ordinarily the most important single decision in a criminal case ... [and] counsel may and must give the client the benefit of counsel's professional advice on this crucial decision.") (internal citations omitted).

In the Second Circuit, effective assistance is "reasonably competent assistance," which means that, "the quality of a defense counsel's representation should be within the range of competence reasonably expected of attorneys in criminal cases." *Trapnell v. United States*, 725 F.2d 149, 153 (2d Cir. 1983). The Supreme Court's two-part test for ineffective assistance of counsel claims, first enunciated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984), requires that the defendant demonstrate both "that counsel's representation fell below an objective standard of reasonableness" and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 687-688, 694. *See also Hill*, 474 U.S. 52 (applying *Strickand*'s test to ineffective assistance of counsel claims in the plea bargain context).

In the context of a claim of ineffective assistance of counsel where counsel failed to communicate a favorable plea offer, leading to the expiration of the acceptance deadline, an offer of a significantly harsher plea agreement, and a subsequent plea of guilty without the benefit of a plea agreement, the Supreme Court found that defense counsel had been ineffective under *Strickland* and remanded the case for the Missouri court to determine whether the defendant had been actually prejudiced. *Missouri v. Frye,* __ U.S. __, 132 S.Ct. 1399 (2012). The Supreme Court explained that:

> In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland*'s inquiry into whether "the result of the proceeding would have been different," 466 U.S., at 694, 104 S.Ct. 2052, requires looking not at whether the defendant would have proceeded to trial absent ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

Frye, 132 S. Ct. at 1410. Ultimately, "To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id.* at 1409 (citing Cf. *Glover v. United States,* 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance")). Such a showing also requires evidence that the defendant would have accepted the earlier plea if he had had the effective assistance of counsel, that the prosecution would not have withdrawn the offer thereafter, and that the judge would have accepted the plea. *Id.*

Here, the government knowingly denied Mr. Rios Suarez the right to the assistance of counsel as mandated by the Supreme Court in *Lafler* when it refused to extend the deadline to accept the plea agreement. All parties involved in the plea negotiations were aware, shortly before January 7, 2014, that communications between Mr. Rios Suarez and his former counsel had broken down and that new counsel had not yet been appointed under the Criminal Justice Act, leaving Mr. Rios Suarez without the effective assistance of counsel (or, indeed, without *any* assistance of counsel).[42]

Simultaneously, Mr. Rios Suarez, a Spanish-speaking citizen of Colombia who had never before been to the United States, was held in pretrial detention at the Metropolitan Detention Center, without access to alternative legal advice or a way to contact his family or friends (all of whom reside outside the United States) to ask them to help him find another lawyer.

Thus, during the time in which he could theoretically have considered whether or not to accept the plea agreement and discussed his options with his attorney, Mr. Rios Suarez was entirely without recourse to the advice of competent counsel or any means by which to engage the services of an attorney to advise him.

When the parties appeared before the Court on January 7, 2014, for the substitution of counsel hearing, it was evident to all concerned that Mr. Rios

[42] See A-20 at ln. 18 to A-21 at ln. 2.

Suarez had not been able to discuss the plea offer with his current attorney.[43] Therefore, he had not yet had the effective assistance of counsel in considering the plea offer. Moreover, because the undersigned had not yet been assigned to represent Mr. Rios Suarez or seen any of the paperwork relating to the case, he was not familiar with the facts of the case, the discovery, the plea agreement terms, or any other of the essential information that would have made it possible for him to provide Mr. Rios Suarez with competent legal advice or, indeed, with any legal advice whatsoever.

Within a week of the substitution hearing, counsel informed the government that Mr. Rios Suarez had accepted the plea offer and wanted to plead guilty. The government's subsequent refusal to honor its agreement to extend the deadline[44] can only be interpreted as a denial of Mr. Rios Suarez's right to the assistance of counsel in violation of the holding of *Lafler* because the government was aware of Mr. Rios Suarez's lack of assistance of counsel before the substitution of counsel hearing on the date that the plea offer was scheduled to expire.

Moreover, thereafter, the government indicated that it was interested in pursuing additional plea negotiations with Mr. Rios Suarez, sending counsel a significantly harsher plea offer[45], which Mr. Rios Suarez subsequently rejected.

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[43] A-20 at ln. 18-24, A-21 at ln. 24 to A-22 at ln. 20.
[44] See A-434-435.
[45] A-386-391.

Appellant is unaware of any objective reason for the government's subsequent insistence on a variety of sentencing enhancements and a higher Guidelines range other than the fact that the government considered itself to have been inconvenienced by Mr. Rios Suarez' missing the acceptance deadline.

Counsel is aware, after having represented numerous clients who have entered pleas of guilty before courts in this District and the Eastern District of New York, that such deadlines are typically fungible and extended innumerable times as long as negotiations are continuing and neither party is prejudiced by such an extension or the trial date is not quickly approaching. Therefore, there was no good faith reason why the deadline to accept the previously offered plea could not have been extended by a week or ten days to allow Mr. Rios Suarez to have the advice of counsel while considering this extremely critical decision.

Because there is no valid reason why the government should have been given the opportunity to enhance Mr. Rios Suarez's Guidelines range beyond the range set forth in the previously negotiated plea agreement based on the history of this case, this Court should protect Mr. Rios Suarez's right to the effective assistance of counsel and remand the case for resentencing at which the district court is instructed to apply the Guidelines range set forth in the previously negotiated (and effectively accepted) plea agreement, with an adjustment based on the United States Sentencing Commission's recent vote to lower all drug guidelines ranges by two points.[46]

In making this argument, counsel is further guided by the language of *Strickland* and *Frye* concerning the effective assistance of counsel. If the undersigned had urged Mr. Rios Suarez to take the plea on the date of the substitution of counsel hearing, before counsel was familiar with the facts of the case or the strength of the evidence against Mr. Rios Suarez, he would have failed to conduct himself with the "objective standard of reasonableness" required by *Strickland*. Therefore, the government's failure to extend the plea deadline, despite knowing that Mr. Rios Suarez had been unable to effectively communicate with his former counsel about the plea offer, virtually guaranteed that Mr. Rios Suarez would not be able to consider the plea offer as mandated by *Lafler* and, in the alternative, asked defense counsel to act unethically and in violation of the standard set forth in *Strickland* by urging his new client to take a plea where pleading guilty might not have been in the client's interest.

Further, because the record indicates that the government would have accepted Mr. Rios Suarez' plea on the date of the substitution of counsel hearing

[46] Moreover, the plea offer would have granted Mr. Rios Suarez the benefit of a meeting to establish whether he qualified for Safety Valve relief under 18 U.S.C. § 3553(f). If he had been found eligible, he could have received another two-point reduction in the Guidelines calculation and could have avoided the mandatory minimum sentence.

(i.e., the date the offer expired), and because courts in the Southern District of New York rarely refuse to accept guilty pleas where the parties reach an agreement, Mr. Rios Suarez was substantially prejudiced by his lack of effective assistance of counsel under *Frye*. Mr. Rios Suarez' subsequent plea to the indictment and the consequent *Fatico* hearing and exorbitant sentence, which was at least 36.5 years higher than the maximum Guidelines sentence as calculated in the plea agreement, demonstrate that this is that rare case where a Sixth Amendment violation caused the defendant severe prejudice and where the case must, therefore, be remanded to allow Mr. Rios Suarez to accept a plea to the negotiated plea agreement and to be sentenced accordingly.

C. Because Mr. Rios Suarez Was Deprived of the Right to Counsel, He Was Likewise Deprived of Due Process of Law at the Plea Bargaining Stage of his Case.

The Fifth Amendment of the United States Constitution provides in part that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. In the context of immigration law, "ineffective assistance of counsel may be the basis for a due process violation." *Aguilar de Polanco v. United States Dep't of Justice*, 123 Fed. Appx. 19, 21 (2d Cir. 2005) (referencing *Rabiu v. INS*, 41 F.3d 879, 882–83 (2d Cir. 1994)).

In this case, not only was Mr. Rios Suarez deprived of effective assistance during the critical few days in which he was presumed to be considering whether or not to accept the government's plea offer; he was without any assistance of counsel at all because of the breakdown in attorney-client communications that had occurred.[47] Therefore, the government's subsequent refusal to extend the deadline for acceptance of the negotiated plea agreement so that Mr. Rios Suarez could consult with new counsel deprived Mr. Rios Suarez of the effective assistance of counsel and simultaneously deprived him of the due process of law to which he was guaranteed.

In fact, it would have been a further violation of Mr. Rios Suarez' Constitutional rights if new counsel had simply advised Mr. Rios Suarez to accept the negotiated plea agreement before new counsel had been able to learn about the case and to advise Mr. Rios Suarez of the immigration consequences of his plea of guilty. *See Padilla*, 559 U.S. at 374 ("[W]e now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.").

The government's refusal to extend the deadline in order for Mr. Rios Suarez to consider the plea offer with the effective assistance of counsel and as a

[47] A-20 at ln. 18-24, A-21 at ln. 24 to A-22 at ln. 20.

simple matter of justice violated Mr. Rios Suarez' Constitutional rights and should be condemned by this Court.

D. Even if the Court Disagrees that the Government's Conduct Violated Mr. Rios Suarez' Constitutional Rights, the Court Should Grant Mr. Rios Suarez the Benefit of the Negotiated Plea Agreement Because the Government's Actions Were Not in Good Faith.

Where, as here, the government holds the fate of an individual in its hands, "concerns for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government" mandate enforcement of even an ill-considered offer that the government now regrets. *Padilla*, 186 F.3d at 140.

1. The Negotiated Plea Agreement Should Be Interpreted in Accordance with Principles of Contract Law and the Government Should Be Held to the Highest Standard of Good Faith.

The government should be compelled to honor Mr. Rios Suarez' good faith acceptance of its offer. The United States Supreme Court has long recognized that plea bargaining is "an essential component of the administration of justice." *Santobello v. New York*, 404 U.S. 257, 260 (1971). However, "the adjudicative element inherent in accepting a plea of guilty[] must be attended by safeguards to insure the defendant what is reasonably due in the circumstances." *Id.* at 262.

As the Second Circuit has explained, "fundamental fairness and public confidence in government officials require that prosecutors be held to meticulous standards of both promise and performance. . . ." *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 295-96 (2d Cir. 1976) (emphasis supplied) (footnotes, internal citations, and quotation marks omitted).

Although "a defendant's acceptance of a prosecutor's proposed plea bargain [does not] create[] a constitutional right to have the bargain specifically enforced," *Mabry v. Johnson*, 467 U.S. 504, 505, 511 & n. 11 (1984), *abrogated in part on other grounds*, *Puckett v. United States*, 129 S.Ct. 1423, 1430 n.1 (2009), the fundamental interest of the United States in maintaining "public confidence in the fair administration of justice," *Padilla*, 186 F.3d at 140, must be protected. Thus, it is in the government's interest as much as in the interest of Mr. Rios Suarez that the government be compelled to honor the negotiated agreement.

Given the government's course of conduct during the plea negotiations and considering that the government withdrew the plea agreement before Mr. Rios Suarez had had an opportunity to avail himself of the effective assistance of counsel during the negotiations, Appellant respectfully submits that he has a right, in equity if not in the Constitution, to have the negotiated plea agreement enforced.

2. Mr. Rios Suarez Suffered Actual Prejudice Because of the Government's Failure to Extend the Plea Agreement and the Consequent Plea to the Indictment, Which Led to the *Fatico* Hearing.

Because the government's refusal to extend the plea acceptance deadline led directly to Mr. Rios Suarez' plea to the indictment and the need for a *Fatico* hearing and, thereafter, to the district court's imposition of an excessive and substantively unreasonable sentence, Mr. Rios Suarez suffered actual prejudice from the government's conduct. As detailed above at page 7, the government's original plea offer omitted all of the sentencing enhancements that the government subsequently sought to prove at the *Fatico* hearing.[48]

The district court's subsequent ruling that the 12 points of enhancements were supported by a preponderance of the evidence and should be applied in calculating Mr. Rios Suarez' sentencing range caused Mr. Rios Suarez substantial actual prejudice, raising his Guidelines range to life in prison from the negotiated plea agreement's effective range of 135-168 months.[49]

In imposing a sentence of 648 months, the district court stated that Mr. Rios Suarez had suffered no prejudice by the government's conduct because, even if he had pled guilty pursuant to a plea agreement, the district court would still have considered all of the factors (i.e., the relevant conduct adduced at the *Fatico* hearing) in imposing sentence and would have imposed the same sentence.[50] However, with all respect to the district court, this argument is erroneous.

If Mr. Rios Suarez had pled guilty pursuant to a plea agreement with an agreed-upon Guidelines range, and with the particular stipulations that the government would not pursue enhancements related to the possession of a firearm (U.S.S.G. § 2D1.1(b)(1)) and the use of an aircraft (U.S.S.G. § 2D1.1(b)(3)) (or, indeed, any enhancements at all), there would have been no need for the *Fatico* hearing.[51] Therefore, the evidence of uncharged conduct that increased Mr. Rios Suarez' Guidelines level by 12 points would not have been before the district court, and it is likely that Mr. Rios Suarez would have received a sentence in the range set out in the negotiated plea agreement (168-210 months) or even two levels lower (135-168 months) based on the pending Sentencing Commission two-level reduction for all narcotics sentences. Because the district court heard and credited the testimony at the *Fatico* hearing, Mr. Rios Suarez' sentence was increased to over three times the high end of the range set out in the plea agreement.[52] This increase caused Mr. Rios Suarez actual prejudice and was a direct result of the government's refusal to extend the plea acceptance deadline.

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[48] A-392-396.
[49] See generally A-216-222.
[50] A-476 at ln. 11-16.

Therefore, because Mr. Rios Suarez' Constitutional rights were violated when the government refused to extend the plea acceptance deadline, and because that refusal led directly to the *Fatico* hearing at which facts were adduced that the district court found to be supported by a preponderance of the evidence and substantially enhanced Mr. Rios Suarez' Guidelines level, this case should be

[51] A-59 at ln. 16-23, A-61 at ln. 9-13.
[52] From 210 months to 648 months.

remanded for resentencing at which the district court should be instructed to apply the Guidelines range set forth in the negotiated plea agreement.

II. The District Court's 648-Month Sentence Was Substantively Unreasonable and Constituted an Abuse of Discretion and a Violation of the Colombian Extradition Order.

A. The District Court's Sentence Is Reviewed Under an "Abuse of Discretion" Standard.

This Court "review[s] all sentences for reasonableness," applying a "deferential abuse-of-discretion standard." *United States v. Yutronic*, 486 Fed. Appx. 146, 147-48 (2d Cir. 2012) (citing *United States v. Fernandez*, 443 F.3d 19, 26–7 (2d Cir. 2006); *Gall v. United States*, 552 U.S. 38, 41, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007); *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (en banc)). "[I]n the great majority of cases, a range of sentences . . . must be considered reasonable." *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008). Therefore, the Court will "set aside a district court's substantive determination" as to an appropriate sentence "only in exceptional cases where the trial court's decision cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 189 (internal quotation marks omitted). "Substantive reasonableness involves the length of the sentence imposed in light of the factors enumerated under 18 U.S.C. § 3553(a)." *United States v. Diaz-Abreu*, 08 CR. 553 (SHS), 2010 WL 1815997 (S.D.N.Y. May 3, 2010) (referencing *United States v. Villafuerte*, 502 F.3d 204, 206 (2d Cir. 2007); *United States v. Canova*, 485 F.3d 657, 679 (2d Cir. 2007)).

"The abuse-of-discretion standard incorporates *de novo* review of questions of law (including interpretation of the Guidelines) and clear-error review of questions of fact." *United States v. Legros*, 529 F.3d 470, 474 (2d Cir. 2008). Substantive review of a district court's sentence requires consideration of "the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion, and bearing in mind the institutional advantages of district courts." *United States v. Molina-Lopez*, 523 Fed. Appx. 845, 847 (2d Cir. 2013) (citing *Cavera*, 550 F.3d at 190).

Bearing in mind the foregoing standards, the district court's sentence in this case was substantively unreasonable and an abuse of discretion.

B. The District Court's Sentence Was Substantively Unreasonable and An Abuse of Discretion.

The district court's sentence, which was predicated in part on the fact that an appeal would be likely to reduce the total sentence through challenges to the enhancements applied, was substantively unreasonable and an abuse of discretion.[53] Although this Court rarely sets aside a sentence for substantive unreasonableness, remand for resentencing is appropriate here "because the sentence imposed was shockingly high . . . [and] . . . unsupported as a matter of law." *United States v. Corsey*, 723 F.3d 366, 378 (2d Cir. 2013) (Underhill, J., concurring) (quoting *United States v. Rigas*, 583 F.3d 108, 121 (2d Cir. 2009)) (remanding case for resentencing where district court sentenced defendants convicted of fraud to the statutory maximum sentence of 20 years each without a sufficient examination of the factors under 18 U.S.C. §3553(a) after calculating that the Guidelines range was 360 months to life imprisonment based on the loss amount).

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[53] Although the district court stated on the record that the sentence imposed was "sufficient but not greater than necessary," the court simultaneously undercut that finding by stating that, "this defendant has the ability to appeal, and various

In this case, for the reasons set forth below, the district court's sentence was substantively unreasonable because of the application of 12 levels of enhancements that was not counterbalanced by a full examination of Mr. Rios Suarez' history and characteristics, the undischarged Colombian sentence, or a reasonable assessment of the Colombian extradition order.

1. The District Court's Enhancements Were Not Supported By The Record.

Based on a calculation that the offense involved 150 kilograms or more of cocaine, the district court found that the applicable base level was 38, which

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appeals may reduce the sentence by way of enhancement reductions." A-502 at ln. 16-17, 21-23.

corresponds to a Guidelines range of 235 to 293 months' imprisonment.[54] Finding them supported by a preponderance of the evidence, the district court adopted each of the government's suggested enhancements, for a total of 12 additional points, leading to a total offense level of 50[55]:

Leader or organizer of the conspiracy (U.S.S.G. § 3B1.1(a))	+4
Criminal livelihood (U.S.S.G. § 2D1.1(b)(14)(C) and (D))	+2
Carried or caused others to carry dangerous weapons (U.S.S.G. § 2D1.1(b)(1))	+2
Unlawful importation of a controlled substance using an aircraft other than a regularly scheduled commercial carrier (U.S.S.G. § 2D1.1(b)(3))	+2
Direction of the use of violence (U.S.S.G. § 2D1.1(b)(2))	+2

None of these enhancements were proper.

a. The District Court Should Not Have Applied the Four-Point Organizer/Leader Enhancement (U.S.S.G. § 3B1.1).

The district court should not have applied the four-point enhancement for an organizer or leadership role in the charged conspiracy, which is appropriate for an individual who acted as an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). To impose this adjustment, the district court must find "(i) that the defendant was 'an organizer or leader,' and (ii) that the criminal activity either 'involved five or more

[54] A-479 at ln. 11.
[55] A-479 at ln. 16 to A-480 at ln. 3.

participants' or 'was otherwise extensive.'" *United States v. Teyer*, 322 F. Supp. 2d 359, 363 (S.D.N.Y. 2004) (quoting *United States v. Zagari*, 111 F.3d 307, 330 (2d Cir. 1997) (internal quotation marks omitted)).[56]

For Mr. Rios Suarez to qualify as an organizer or leader under case law in this Circuit, the district court would have to have found that Mr. Rios Suarez satisfied the criteria in U.S.S.G. § 3B1.1 Application Note 4:

> In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Therefore, "In enhancing a defendant's sentence based on his role in the offense, a district court must make specific factual findings as to that role." *United States v. Stevens*, 985 F.2d 1175, 1183-84 (2d Cir. 1993) (referencing *United States*

[56] *See also Teyer*, 322 F. Supp. 2d at 364 (quoting *United States v. Payne*, 63 F.3d 1200, 1212 (2d Cir.1995) ("A defendant acts as a manager or supervisor of a criminal enterprise involving at least five participants if he exercises some degree of control over others involved in the commission of the offense or plays a significant role in the decision to recruit or to supervise lower-level participants.") (internal citations, brackets and quotation marks omitted)). Distinguishing a "manager or supervisor," U.S.S.G. § 3B1.1(b), from an "organizer or leader," *id.* § 3B1.1(a), may well be more of an art than a science.

v. Lanese, 890 F.2d 1284, 1294 (2d Cir.1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2207, 109 L.Ed.2d 533 (1990)). *See also Teyer*, 322 F. Supp. 2d at 365 (finding a four-level enhancement proper where "Torres–Teyer quite literally organized the Belizean trans-shipment operation, which itself qualifies as a highly complex criminal activity and a major part of the overall importation scheme. He did not act as a mere manager or supervisor, but as a high-level operative who recruited, supervised, and directed dozens of individuals and organized their activity.").

In this case, the government did not provide sufficient evidence for the district court to make a determination that Mr. Rios Suarez was a leader or an organizer. At the *Fatico* hearing, Garzon testified that he witnessed Mr. Rios Suarez in the laboratory "giv[ing] orders regarding the work that was being done in that area."[57] However, Garzon did not elaborate exactly what kind of orders Mr. Rios Suarez was giving and can only remember one specific instance he was personally given an order in the laboratory. He testified, "I can remember one maybe where I had to stand guard at one of the laboratories in that area for a while."[58] Garzon's testimony suggests that the true leaders and organizers of the laboratories were members of the FARC. He stated that it was "very common" to

[57] A-118 at ln. 6-7.
[58] A-118 at ln. 10-11.

see FARC around the area of the laboratory[59], and that they were present in the laboratory "[b]ecause they also had the control over or they administered the laboratory and what was done there, and on some occasions they needed to be present there and they also lent security to the lab."[60] Therefore, Garzon's testimony did not lead to the conclusion that Mr. Rios Suarez was a leader or organizer.

Ramirez-Pajon testified that Didier Rios, Mr, Rios Suarez's nephew, was Ramirez-Pajon's partner.[61] He testified that Mr. Rios Suarez was "in charge of providing the fuel, providing the security on the landing strips, and setting up the cocaine, preparing it."[62] He did not testify that Mr. Rios Suarez supervised or controlled anyone. Therefore, a four-point enhancement for a leadership role was improper.

b. The District Court Should Not Have Applied the Two-Point Criminal Livelihood Enhancement (U.S.S.G. § 2D1.1(b)(14)).

The enhancement for "criminal livelihood" pursuant to U.S.S.G. § 2D1.1(b)(14)(E) should not have been applied. Application Note 29(c) to U.S.S.G. § 2D1.1 provides that, "For purposes of subsection (b)(14)(E), 'pattern of criminal conduct' and 'engaged in as a livelihood' have the meaning given such terms in §4B1.3 (Criminal Livelihood)." In turn, U.S.S.G. § 4B1.3 Application Note 2 provides that:

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[59] A-119 at ln. 21.
[60] A-120 at ln. 8-11.
[61] A-189 at ln. 6-7.
[62] A-191 at ln. 9-10. In contrast, Garzon testified that he had only seen Mr. Rios Suarez at a landing strip, "I recall mainly one time." A-112 at ln. 21. As with his assertions concerning Mr. Rios Suarez' involvement in murders, Garzon's recollection as to Mr. Rios Suarez' activities was of dubious veracity at best.

> "Engaged in as a livelihood" means that (A) the defendant derived income from the pattern of criminal conduct that in any twelve-month period exceeded 2,000 times the then existing hourly minimum wage under federal law; and (B) the totality of circumstances shows that such criminal conduct was the defendant's primary occupation in that twelve-month period (e.g., the defendant engaged in criminal conduct rather than regular, legitimate employment; or the defendant's legitimate employment was merely a front for the defendant's criminal conduct).

U.S.S.G. § 4B1.3 Application Note 2.

Therefore, in order for this enhancement to apply, the government would had to have proven both that Mr. Rios Suarez's total income derived from narcotics was greater than 2,000 times the existing federal minimum wage in the period in question and that the same criminal conduct had been Mr. Rios Suarez's primary occupation. The government failed to meet its burden on either of these points, offering no evidence of the income attributable to Mr. Rios Suarez personally from his alleged narcotics dealing. Therefore, the two-point enhancement for "criminal livelihood" pursuant to U.S.S.G. § 2D1.1(b)(14)(E) should not have been applied.

c. The District Court Should Not Have Applied the Two-Point Enhancement for Use of a Firearm During the Offense (U.S.S.G. § 2D1.1(b)(1)).

The district court should not have applied the two-point enhancement for use of a firearm during the offense under U.S.S.G. § 2D1.1(b)(1) because the district court's Order did not find that the requirements of the enhancement were met. The district court found that "the defendant caused members of the conspiracy, including individuals guarding the laboratories at which the cocaine was manufactured (and as to which the defendant had supervisory responsibility) to carry weapons."[63] However, this finding does not mirror the language of the enhancement, which provides for a two-level increase "[i]f a dangerous weapon (including a firearm) was possessed." U.S.S.G. § 2D1.1(b)(1).

Moreover, none of the testimony at the *Fatico* hearing established that Mr. Rios Suarez possessed a firearm or dangerous weapon that he used during the course of or in furtherance of the conspiracy. Garzon testified that Mr. Rios Suarez almost always carried a weapon with him.[64] However, Garzon did not testify that the weapon was possessed as part of the conspiracy. On information and belief, it is very common for individuals in Colombia to possess weapons for their own safety, given the volatile security situation. That an individual possessed

[63] A-220.
[64] A-119 at ln. 11.

a weapon in Colombia cannot, therefore, be equated to the possession of a weapon in connection with a narcotics conspiracy as intended by this enhancement.

Ramirez-Pajon testified that he had seen Mr. Rios Suarez with a rifle once. "That was a house he had in El Safari, Venezuela, he took out a big weapon. He showed it to us and said that was for his safety."[65] Ramirez-Pajon did not testify that Mr. Rios Suarez owned the alleged rifle or provide the time period during which this "showing" occurred. Ramirez-Pajon did not testify that Mr. Rios Suarez used or possessed the weapon in furtherance of the drug trafficking conspiracy or for any reason other than for his personal safety and to protect his home. Moreover, Ramirez-Pajon's statement was almost certainly a fabrication because he never mentioned this alleged rifle in the course of his cooperation with the government before his testimony on May 7, 2014.

Therefore, the district court could not reasonably have found by a preponderance of the evidence that the testimony established that Mr. Rios Suarez possessed a firearm during the course of the conspiracy within the meaning of the Guidelines enhancement.

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[65] A-197 at ln. 2-9.

d. The District Court Should Not Have Applied the Two-Point Enhancement for Use of an Aircraft in the Importation of a Controlled Substance (U.S.S.G. § 2D1.1(b)(3)).

The district court should not have applied the two-point enhancement for use of an aircraft because the government failed to prove that any of the cocaine that came to the United States arrived in an aircraft other than a regularly scheduled commercial aircraft.

The Guidelines provide for a two-level increase "[i]f the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance . . ." U.S.S.G. § 2D1.1(b)(3). However, no testimony demonstrated that any cocaine from the conspiracy arrived in the United States in any manner other than by commercial aircraft. Garzon testified that, "What the pilots would represent to us was that the final destination for those routes usually was the United States, but also the routes that would go to Brazil and to other parts of Europe, according to what the pilots told us, in a certain way some of that cocaine also had a final destination of the United States."[66] He did not specify the manner in which the cocaine allegedly reached the United States.

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[66] A-127 at ln. 2-7. Additionally, in a July 26th (year unknown) proffer session, Garzon stated that "some" of the cocaine, once it arrived in Brazil, Guyana, and various locations throughout Europe, was sent to the United States on commercial flights. [3502-F proffer session, handwritten notes, p. 5 (available on request)]

Ramirez-Pajon testified that the cocaine went to Haiti, the Dominican Republic, Puerto Rico, Guatemala, and Honduras.[67] He did not testify that *any* cocaine was transported by the co-conspirators or with Mr. Rios Suarez's knowledge to the United States. Therefore, because there is no evidence that the cocaine that reached the United States did so in an aircraft "other than a regularly scheduled commercial air carrier," the requested enhancement should not have been applied.

e. The District Court Should Not Have Applied the Two-Point Enhancement for the Direction of the Use of Violence (U.S.S.G. § 2D1.1(b)(2)).[68]

The district court found that the enhancement "[i]f the defendant used violence, made a credible threat to use violence, or directed the use of violence," applied and that Mr. Rios Suarez's Guidelines range should be accordingly enhanced by two levels. U.S.S.G. § 2D1.1(b)(2). However, U.S.S.G. § 2D1.1 Application Note 11(B) instructs that, "in a case in which the defendant merely possessed a dangerous weapon but did not use violence, make a credible threat to use violence, or direct the use of violence, subsection (b)(2) would not apply."

[67] A-190 at ln. 20-21.

[68] The government's intention to seek this enhancement appears for the first time in its letter concerning the *Fatico* hearing dated March 28, 2014 (see A-398), and that the government never indicated during plea negotiations or at any other time during the pendency of this case that it believed this enhancement to be appropriate.

The *Fatico* hearing testimony that Mr. Rios Suarez had been involved in acts of violence was not credible. Garzon, who had been cooperating with various authorities since 1991, never mentioned Mr. Rios Suarez's involvement in any violence until a proffer session with the government on January 24, 2014. At the *Fatico* hearing, he suddenly testified to numerous murders that he asserted Mr. Rios Suarez had been involved in or had ordered. However, he had never discussed these murders in his 23 years of cooperation with various authorities, including his 2002 proffer sessions in which he stated that he was afraid of the defendant but did not accuse him of being involved in murders. Therefore, his 2014 testimony concerning Mr. Rios Suarez's involvement in acts of violence cannot be believed.

First, Garzon testified that, as to the alleged murder of the two watchmen (which in any event occurred well before the start of the charged conspiracy), "[s]omeone from the Tenth Front of the FARC," *not* Mr. Rios Suarez, had ordered them killed.[69] Second, Garzon never mentioned the murder of Jaime Huergos (which also occurred outside the relevant timeframe) until January 24, 2014.[70] Third, Garzon's testimony about the two farmers, whose deaths, he asserted on January 24, 2014, had been the cause of his leaving to seek the protection of the Colombian authorities, is implausible.

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[69] A-90 at ln. 21 to A-91 at ln. 1.
[70] A-92 at ln. 9-15; A-93 at ln. 4-5, 10-12, 15-18.

Although he testified at length about the supposed murder of the farmers at the *Fatico* hearing, Garzon never stated that Mr. Rios Suarez had ordered the men to be killed.[71] Garzon's testimony as to this murder contradicted his prior, arguably more reliable, testimony. In his January proffer session, Garzon testified that the murder of the farmers had been the reason that he had fled from his position with Didier Rios.[72] However, in prior proffers he testified that he had fled because of the imminent attack on the Eighteenth Brigade. Moreover, when Garzon fled and had his first substantial debriefing with the Colombian prosecutors' office on May 3 and 4, 2002, he ended the testimony with a statement that he was asking for protection from the Colombian authorities, *but did not state that he was afraid because he had seen people murdered* or mention Mr. Rios Suarez's involvement in any murder *at all*.[73]

If Garzon had been truly afraid for his life based on having seen Mr. Rios Suarez's involvement in these alleged murders, he would undoubtedly have stated this fear and accused Mr. Rios Suarez of the crime when it was in his immediate past; he would not have waited for 12 years to mention it for the first time when, coincidentally, the government was seeking information against the person Garzon now accuses.

[71] A-149 at ln. 2-26.
[72] See 3502-H proffer session handwritten notes p. 3 (available on request).
[73] See 3502-B; 3502-I (available on request).

Therefore, the district court should have disregarded Garzon's implausible testimony and should not have applied the requested enhancement for the use or direction of violence.

Moreover, even if the enhancements were proved by a preponderance of the evidence, this Court has found that:

> A guideline system that prescribes punishment for unconvicted conduct at the same level of severity as convicted conduct obviously obliges courts to proceed carefully in determining the standards for establishing whether the relevant conduct has been proven. We have recognized the need for such care with regard to the basic issue of the degree of the burden of proof. Thus, though the Sentencing Commission has favored the preponderance-of-the-evidence standard for resolving all disputed fact issues at sentencing, U.S.S.G. § 6A1.3., p.s., comment., **we have ruled that a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence.** *See United States v. Gigante*, 94 F.3d 53, 56-57 (2d Cir.1996) (denying petition for rehearing).

United States v. Shonubi, 103 F.3d 1085, 1089 (2d Cir. 1997) (emphasis supplied).

There can be no doubt that the application of the 12 points of sentencing enhancements significantly enhanced Mr. Rios Suarez' sentence by at least 438 months (36.5 years). Mr. Rios Suarez contested each aspect of the alleged relevant conduct at the *Fatico* hearing and in his sentencing submissions. Appellant respectfully submits that the district court erred in finding that the enhancements had been proven by a preponderance of the evidence rather than by a "more rigorous standard" as instructed in *Shonubi*. And, because the enhancements were not proved by a standard exceeding a preponderance of the evidence, they should not have been applied in calculating Mr. Rios Suarez' offense level.[74]

2. The District Court's Statement that the Sentence Was Likely to be Lowered on Appeal Evidences an Improper Piling On of Enhancements.

Even assuming *arguendo* that the district court correctly found the enhancements were supported by a preponderance of the evidence and that they applied to Mr. Rios Suarez' case, the district court's arithmetic, as urged by the government, led to an absurd calculation of Mr. Rios Suarez' offense level and a correspondingly high sentence that the district court seemed to anticipate would not withstand scrutiny.[75] The district court's failure to depart downward in recognition of the absurd Guidelines calculation was substantively unreasonable and an abuse of discretion.

As this Court has noted, "When the Guidelines range zooms off the sentencing table, sentencing judges are discouraged from undertaking close examination of the circumstances of the offense and the background and characteristics of the offender." *Corsey*, 723 F.3d at 380 (Underhill, J., concurring). With all respect to the district court, Appellant submits that the combination of his high base offense level, the government's proposed enhancements, and the government's argument in its sentencing memorandum that the defense's submission concerning Mr. Rios Suarez' personal history and characteristics represented an attempt to mislead the district court rather than an examination of the relevant sentencing factors under 18 U.S.C. § 3553(a)[76], caused the district court to impose a ridiculously high sentence, exposing "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense." *United States v. Adelson*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006). As Judge Rakoff noted:

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[74] In addition, the application of the 12 points of enhancements increased the severity of Mr. Rios Suarez' case in the district court's eyes to the extent that the district court found that Mr. Rios Suarez was more culpable and deserving of greater punishment than the convicted financial officer of the Tenth Front of the FARC, Ignacio Leal Garcia. A-499 at ln. 13-15 Mr. Leal Garcia was sentenced to 24 years of imprisonment after his conviction for involvement with the charged narcotics conspiracy that was more extensive and chronically longer than that of Mr. Rios Suarez. *See United States v. Ignacio Leal Garcia*, Case No. 04-CR-446 (TFH) (D.D.C.); A-297-298.

[75] *See* A-502 at ln. 21-23.

> [T]he Sentencing Guidelines, because of their arithmetic approach and also in an effort to appear "objective," tend to place great weight on putatively measurable quantities, such as the weight of drugs in narcotics cases or the amount of financial loss in fraud cases, without, however, explaining why it is appropriate to accord such huge weight to such factors. *See generally* Kate Stith & José A. Cabranes, *Fear of Judging: Sentencing Guidelines in the Federal Courts* 69 (1998).

Adelson, 441 F. Supp. 2d at 509. In *Adelson*, Judge Rakoff imposed a 42-month sentence on a defendant convicted of fraud where the Guidelines called for life imprisonment based on the loss amount and role in the offense. Judge Rakoff

[76] A-416.

criticized the Guidelines calculation, which added 20 points' worth of enhancements to the base offense level, as "the kind of piling-on of points for which the guidelines have frequently been criticized." *Adelson*, 441 F. Supp. 2d at 510 (internal quotation omitted). Judge Rakoff also noted that "the [Sentencing] Commission has never explained the rationale underlying *any* of its identified specific offense characteristics, why it has elected to identify certain characteristics and not others, or the weights it has chosen to assign to each identified characteristic." *Adelson*, 441 F. Supp. 2d at 510 (internal quotation and citation omitted).

Judge Rakoff noted that if a district court finds a sentencing enhancement is supported by the evidence, the court is required to add that enhancement to the Guidelines calculation. *Adelson*, 441 F. Supp. 2d at 510-11. However, he concluded that:

> [W]here, as here, the calculations under the guidelines have so run amok that they are patently absurd on their face, a Court is forced to place greater reliance on the more general considerations set forth in section 3553(a), as carefully applied to the particular circumstances of the case and of the human being who will bear the consequences.

Adelson, 441 F. Supp. 2d at 515.

Following *Adelson*, the Honorable Judge Block, faced with white collar defendants whose Guidelines ranges were 360 months to life in prison, sentenced the defendants to 60 months each, finding that the Guidelines sentencing range was "patently absurd on [its] face." *United States v. Parris*, 573 F. Supp. 2d 744, 745 (E.D.N.Y. 2008). In passing, Judge Block noted that the mean terms of imprisonment, in months, imposed by district courts nationwide for drug trafficking was 84.4 months. *Parris*, 573 F. Supp. 2d at 752.

Finally, in 2013, this Court remanded a case involving three defendants for resentencing where the district court imposed the statutory mandatory minimum sentence of 20 years on each defendant after calculating that the Guidelines range for each exceeded that statutory mandatory minimum sentence. This Court instructed that a sentencing court must make an individualized assessment of each defendant, including consideration of the 3553(a) factors. *Corsey*, 723 F. 3d at 375-377.

Here, the 54-year sentence appears calculated to ensure that 46-year-old Mr. Rios Suarez would have to reach 100 years of age before his term of incarceration would expire—i.e., the district court, despite protestations to the contrary, imposed a life sentence on Mr. Rios Suarez.

Appellant acknowledges that the district court considered the relevant 3553(a) factors, which were detailed in the defense's sentencing memorandum[77] and does not suggest that the sentence was procedurally unreasonable. However, with all respect to the sentencing judge and with full awareness that "that sentencing is the most sensitive, and difficult, task that any judge is called upon to undertake," (*Adelson*, 441 F. Supp. 2d at 515), Appellant submits that the district court's sentence was excessive and was guided by the extremely high Guidelines calculation without due regard for extenuating circumstances in this case including the government's prior plea offer, Mr. Rios Suarez' 100-month Colombian sentence, or the terms of the Colombian extradition order pursuant to which Mr. Rios Suarez was subject to the jurisdiction of the district court.

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[77] *See* A-475 at ln. 7-11 ("[L]et me just say that according to 3553(a), even today, the sentence will be determined based upon the Court's decision as to a sufficient but not greater than necessary sentence, and that is done, frankly, irrespective of the guidelines."); A-493 at ln. 24 to A-494 at ln. 2 ("The Court's sentence is primarily driven by the statute, the federal statute, 3553(a), which asks the Court to

C. The District Court's Failure to Consider the Colombian Sentence or to Request Further Submissions on the Finality of that Conviction Was Unreasonable.

In its sentencing memo, the defense argued that Mr. Rios Suarez should be given credit for the 100-month sentence that he will serve in Colombia at the conclusion of the sentence imposed in this case under 18 U.S.C. § 3553(a), U.S.S.G. § 5G1.3, and case law in this Circuit.[78]

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look at a number of factors, each of which I have looked at. If I don't recite each and every factor in terms of its magic words now, I want to assure everyone that I always read 3553(a) before every sentencing to make sure that I've actually covered each of its various aspects.").

[78] A-281-295.

At sentencing, the district court declined to credit Mr. Rios Suarez with the time remaining to be served on his Colombian 100-month sentence.[79] Despite the discussion of the Colombian offense in the Resolutions, the district court found that it was unable to determine the extent of overlap between the Colombian conviction and the instant offense or whether Mr. Rios Suarez was certain to serve the full 100-month sentence.[80]

Having found that the record contained insufficient information concerning the Colombian conviction to support the application of Guideline §1B1.3 (relevant conduct), the district court should have requested additional information from the parties in order to reach a determination of the extent of overlap between the Colombian conviction and the instant case. Because it did not, this case must be remanded for resentencing at which Mr. Rios Suarez' undischarged Colombian sentence is taken into consideration.

D. The District Court's Failure to Adjust Mr. Rios Suarez' Sentence to Reflect the 100-Month Colombian Sentence Violated the Guidelines' Instruction in 5G1.3(b) Without Justification and Was Substantively Unreasonable.

As detailed above at pages 3 to 4, the Colombian conviction for which Mr. Rios Suarez was sentenced to 100 months of imprisonment was relevant conduct to the instant offense. Moreover, because the government sought, and the district

[79] A-498 at ln. 21-23.
[80] A-498 at ln. 12-20.

court granted, the application of a sentencing enhancement based on criminal livelihood[81], Guidelines section 5G1.3(b) applied to Mr. Rios Suarez, mandating adjustment for the undischarged term of imprisonment.

Conduct that is part of the instant offense is "conduct that is relevant conduct to the instant offense under the provisions of section 1B1.3." U.S.S.G. § 4A1.2 Application Note 1. "Relevant conduct" includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant" that "were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. §§ 1B1.3(a)(1)(A), (a)(2).

Section 5G1.3 of the Sentencing Guidelines provides:

> (b) If . . . a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) **and** that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) **or** Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:
>
>> (1) the court **shall** adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and
>>
>> (2) **the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment**. (emphasis added)

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[81] A-221; A-472 at ln. 9-17.

As demonstrated by the facts of the two convictions, the Colombian conviction for which Mr. Rios Suarez received the 100-month sentence is relevant conduct to this case because, as in the Colombian case, Mr. Rios Suarez was convicted of being involved in the transportation and importation of "thousands" of kilograms of cocaine.

The Colombian courts that allowed Mr. Rios Suarez to be extradited to the United States did so under the impression that, because of the different time periods at issue in the Colombian case and in this indictment, Mr. Rios Suarez was not exposed to problems of double jeopardy.[82] Nonetheless, with the exception of the timeframe difference, the conduct at issue in each case can accurately be characterized as a "common scheme or plan," namely, the manufacture and distribution of cocaine via clandestine landing strips. In this respect, the testimony of cooperating witness Yon Garzon Garzon at the *Fatico* hearing, which, on information and belief, mirrored his testimony in the Colombian case, is instructive.[83] Similarly, the government's second witness, Luis Ramirez Pajon, testified about his involvement in a cocaine transportation conspiracy with Mr.

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[82] See A-372 at ¶ 8.

[83] Based on conversations with Mr. Rios Suarez' Colombian attorney, it appears that no documents from the Colombian case were preserved. The resolutions pursuant to which Mr. Rios Suarez was extradicted to the United States discuss the arguments concerning double jeopardy at A-372 and A-376-380.

Rios Suarez a few years later.[84] Pajon's testimony was the only testimony that related to a timeframe other than that of the Colombian case. Therefore, the Colombian case should have been considered related conduct, and Mr. Rios Suarez' sentence should have been accordingly adjusted.

Moreover, although the government conceded that Mr. Rios Suarez is in Criminal History Category I because his foreign convictions are not counted in the criminal history computation, the government sought, and the district court found applicable, an enhancement pursuant to U.S.S.G. § 2D1.1(b)(14) for criminal livelihood.[85] Therefore, "the sentence for the instant offense **shall** be imposed to run concurrently to the remainder of the undischarged term of imprisonment." U.S.S.G. § 5G1.3(b) (emphasis added). Because the district court's sentence did not comply with the instruction of U.S.S.G. § 5G1.3(b), the case must be remanded for resentencing where, at a minimum, Mr. Rios Suarez' sentence is reduced by 100 months in light of the Colombian sentence.

E. The District Court's Sentence Violated the Colombian Extradition Order.

The district court's sentence of 648 months (54 years), which effectively guarantees that Mr. Rios Suarez will die in a federal prison, violated the Colombian extradition order pursuant to which Mr. Rios Suarez was subject to the

[84] A-188 at ln. 21.
[85] A-472 at ln. 9-17.

jurisdiction of the district court, and was based on an erroneous application of the case law in this Circuit. Therefore, Mr. Rios Suarez' case must be remanded for resentencing.

1. Mr. Rios Suarez Has Standing to Contest the District Court's Disregard for the Colombian Extradition Order.

Mr. Rios Suarez has standing to contest the district court's disregard for the terms of the Colombian extradition order under principles of international comity and the rule of specialty. "The rule of specialty is a principle of international law that prohibits extraditing countries from prosecuting a defendant on charges other than those for which he was specifically extradited." *United States v. Restrepo,* 547 Fed. Appx. 34, 45 (2d Cir. 2013) (citing *United States v. Levy*, 25 F.3d 146, 159 (2d Cir. 1994)). "This doctrine also requires an extraditing country to adhere to express limitations placed on prosecution by the surrendering country." *Id.* (citing *United States v. Cuevas*, 496 F.3d 256, 262 (2d Cir. 2007)).

In *Cuevas*, this Court held that defendants who contest violations of the rule of specialty pursuant to a treaty between the United States and the extraditing country have standing to contest violations of that treaty. *Cuevas*, 496 F.3d at 262. There is no extradition treaty between the United States and Colombia. As is customary where no treaty governs extradition requests, Mr. Rios Suarez was extradited to the United States pursuant to a Diplomatic Note that was approved by a decision of the Colombian Criminal Cassation Division of the Supreme Court of

Justice and upheld on appeal by two Resolutions by the Foreign Ministry of Colombia. Similarly to a treaty, the Resolutions placed limitations on the offenses for which Mr. Rios Suarez could be prosecuted and on the sentence that could be imposed.[86]

This Court has not yet decided whether appellants who allege violations of a Diplomatic Note have standing to bring a challenge based on the rule of specialty. *See Restrepo*, 547 Fed. Appx. at 45 (referencing *Cuevas*, 496 F.3d at 262); *see also United States v. Frankel,* 443 Fed. Appx. 603, 606 (2d Cir. 2011) (summary order) ("We do not decide whether Frankel has standing to assert the rule of specialty as a basis to challenge his sentence because his argument fails on the merits."); *United States v. Lopez–Imitalo,* 305 Fed. Appx. 818, 819 (2d Cir. 2009) (summary order) (same).

Nonetheless, as this Court stated in *Baez*, to the extent that an extradited individual asserts that his prosecution breached the extradition agreement and "may be an affront to the surrendering sovereign," the extradited individual may raise those objections. *United States v. Baez,* 349 F.3d 90, 92 (2d Cir. 2003) (internal citations omitted). "A district court's interpretation of an extradition agreement and application of the principle of specialty involve questions of law, and we therefore review them *de novo.*" *Id.*

[86] See, e.g., A-374 at Article 3.

2. The Colombian Extradition Order Forbids the Imposition of a Life Sentence.

The conditions of extradition were detailed in the Colombian Government's Resolution 382, dated October 2, 2012, and Resolution 453, dated December 14, 2012.[87] Concerning the sentence to be imposed, Resolution 382 specified that, "the [Colombian] Government should make it a condition of delivery that the person required in extradition **may not be** sentenced to death nor tried for acts other than those that motivate extradition, **no[r] subjected to . . . life imprisonment** . . ." and that recognized due process guarantees should apply.[88] Those due process guarantees include assurance "**that the penalty eventually imposed upon him may not be out of proportion**, . . . and that the sentenced [*sic*] to imprisonment . . . have the essential purpose of reform and social adaptation."[89]

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[87] Resolution 453 affirms Resolution 382.

[88] A-370-371 ¶ 6 (citing the decision of the Criminal Cassation Division of the Supreme Court of Justice dated September 19, 2012)) (emphasis added). *See also* A-374. ("Therefore it is, RESOLVED: . . . Article 3. To order the delivery of the citizen YESID RIOS-SUAREZ, with the commitment on the part of the State Requiring, of compliance with conditions referred to in Section 494.2 of Law 906/2004, that is, that **the required citizen may not be subject to** forced disappearance, torture or cruel, inhuman or degrading treatment, nor to exile, **life imprisonment** and confiscation.") (emphasis added).

[89] A-371 (emphasis added). Similarly, the Resolution noted the importance of family contact, making it a "condition of delivery" that Mr. Rios Suarez be offered "rational and real possibilities [for] . . . regular contact with his close family." *Id.* As this Court is no doubt aware, a 54-year sentence in federal prison for an individual whose family has no possible legal way to travel to this country will guarantee just the opposite—that Mr. Rios Suarez will never see his family again.

On January 31, 2014, after Mr. Rios Suarez's extradition but before his plea of guilty, the Consulate of Colombia sent a letter to the district court with copies to counsel restating the terms of the extradition order, in which the Colombian court permitted Mr. Rios Suarez's extradition only on the condition that "a sentence of life imprisonment **will not** be sought or imposed"[90] and that he "will not be subject to forced disappearance, torture or cruel and unusual punishment, degrading or inhumane treatment, or exile."[91]

3. The Sentence Imposed is Effectively a Life Sentence.

The 648-month (54-year) sentence imposed on Mr. Rios Suarez is effectively a life sentence. Indeed, the district court recognized as much and insisted—twice—that she was not pronouncing the words "life imprisonment."[92] At the time of sentencing, Mr. Rios Suarez was 46 years old. Thus, the district court's sentence effectively condemned him to die in jail unless he were to live beyond the age of 100 years.

The life expectancy of a Colombian male born in 1967, such as Mr. Rios Suarez, is 58.3 years.[93] Therefore, even assuming that Mr. Rios Suarez will serve

[90] A-366 (emphasis supplied).
[91] A-366.
[92] A-502 at ln. 19-21.
[93] See http://countryeconomy.com/demography/life-expectancy/colombia (accessed April 24, 2014).

"only" 85% of the 54-year sentence, he would still be released at the age of nearly 92—well beyond his life expectancy.[94]

4. Second Circuit Precedent is Distinguishable and Does Not Support the District Court's Sentence.

In discussing the application of the Colombian extradition order and pronouncing sentence, the district court relied primarily on the Second Circuit's opinion in *United States v. Baez,* 349 F.3d 90 (2d Cir. 2003). That case is distinguishable on its face. *Baez* concerned a defendant who was extradited from Colombia, convicted, and sentenced to life imprisonment for crimes including racketeering, conspiracy, and murder in aid of racketeering. In imposing sentence, District Judge Shira Scheindlin found a life sentence appropriate and concluded

[94] Appellant notes that, in the context of juvenile sentences, the United States Supreme Court has instructed that a sentence of life imprisonment without the possibility of parole is unconstitutional. *See Miller v. Alabama*, 567 U.S. __, 132 S.Ct. 2455 (2012); *Graham v. Florida*, 560 U.S. 48, 130 S.Ct. 2011 (2010). At least two circuits have held that a sentence imposed as a term of months that has the effect of life imprisonment is equally as unconstitutional as a sentence in which the words "life imprisonment" are pronounced. *See, e.g., Moore v. Biter*, 725 F.2d 1184, 1191-92 (9th Cir. 2013) (finding that aggregate consecutive sentences of 254 years imposed on a juvenile non-homicide offender was "materially indistinguishable" from the life sentence without parole at issue in *Graham*); *Thomas v. Pennsylvania*, No. 10-4537, 2012 WL 6678686 at *2 (E.D. Pa. Dec. 21, 2012) (holding that the imposition of aggregate consecutive sentences of 65-to-150 years with eligibility for parole at age 83 on a juvenile non-homicide offender (more than a decade beyond his life expectancy) was unconstitutional under *Graham*). In this case, although Mr. Rios Suarez is not a juvenile, Appellant submits that the larger principle in the above-cited cases is applicable to his case. A sentence stated in a term of months that has the effect of imposing life imprisonment may be both cruel and unusual and unconstitutional.

that she was not bound by the Diplomatic Note that had ensured the Colombian government that:

> should [the defendant] be convicted of the offenses for which extradition has been granted, the United States executive authority, with the agreement of the attorney for the accused will not seek a penalty of life imprisonment at the sentencing proceedings in this case. The Government of the United States also assures the Government of Colombia that, *should the competent United States judicial authority nevertheless impose a sentence of life imprisonment against [the defendant]*, the United States executive authority will take appropriate action to formally request that the court commute such sentence to a term of years.

Baez, 349 F. 3d at 92 (emphasis in *Baez*). The Second Circuit agreed that "the [Diplomatic Note] expressly contemplated the possibility that a sentencing court might impose a term of life imprisonment . . ." *Id.* Therefore, the defendant was not assured a sentence less than life imprisonment.

Similarly, in *Lopez-Imitalo*, the Court relied on *Baez* to uphold the 40-year (effective life) sentence imposed where "the sentence did not breach the Diplomatic Note that preceded appellant's extradition from Colombia because it, like the note in *Baez*, 'expressly contemplated the possibility that a sentencing court might impose a term of life imprisonment . . .'" *Lopez-Imitalo*, 305 Fed. Appx. at 819.

In this case, however, the Colombian extradition order is notably more direct, stating that extradition may proceed on the condition that a life sentence

may not be imposed.[95] Therefore, the district court's reliance on *Baez* for the proposition that an effective life sentence of 54 years did not violate the agreement between the governments of the United States and Colombia pursuant to which Mr. Rios Suarez was extradited was erroneous.

This Court has instructed that, "courts should temper their discretion in sentencing an extradited defendant with deference to the substantive assurances made by the United States to an extraditing nation." *Baez*, 349 F.3d at 93 (referencing *Regan v. Wald*, 468 U.S. 222, 242, 104 S.Ct. 3026 (1984)). Deferring to the "limitations imposed by an extraditing nation" assists in the United States' "effort to protect United States citizens in prosecutions abroad." *Baez*, 349 F. 3d at 93. "Moreover, in evaluating the exact limitations set by the extraditing nation, courts should not elevate legalistic formalism over substance." *Id.*

Because the district court's sentence failed to follow this Court's instruction, and because the district court's statement that, "I am not imposing a life sentence,"[96] "elevate[d] legalistic formalism over substance," (*Baez*, 349 F. 3d at 93), Mr. Rios Suarez' case must be remanded for resentencing. At resentencing, the district court should be instructed to impose a sentence within the Guidelines range calculated in the proposed plea agreement as argued in Point I, above. In the alternative, the district court should be instructed to impose a sentence that

[95] A-374 at Article 3 (emphasis supplied).
[96] A-502 at ln. 19-21.

adequately considers Mr. Rios Suarez' age, his life expectancy, and the 100-month Colombian sentence that remains to be served, and tempers justice in this case with deference to the Colombian extradition order, with common sense, and with mercy.

F. The Court's Failure to Credit Mr. Rios Suarez with the Time Spent Awaiting Extradition Violated the Colombian Extradition Order.

According to the official extradition decree, Mr. Rios Suarez "is entitled to recognition by the States Requiring [i.e., the United States] of the time he has spent detained by reason of the extradition proceedings."[97] Mr. Rios Suarez was notified of the extradition proceedings while in custody of the Colombian authorities on February 1, 2012, and he was transferred to the custody of the United States on April 25, 2013.[98] Therefore, Mr. Rios Suarez was entitled to credit for the nearly 15 months that he was incarcerated during the extradition proceedings in this case. *See also United States v. Torres*, 01 CR. 1078 (LMM), 2005 WL 2087818 (S.D.N.Y. Aug. 30, 2005) ("Defendant will be given credit for the time he spent in Columbian custody prior to extradition in relation to the present case.").

However, at sentencing, the district court declined to make a recommendation to the Bureau of Prisons concerning credit for the 15 months that Mr. Rios Suarez had spent awaiting extradition. The district court based its ruling on the fact that Mr. Rios Suarez had contested his extradition, noting that, "it's a factor against getting credit if you've actually fought the extradition to use the conditions of confinement as a basis for getting credit. If you're in a four-by-four windowless cell that's got terrible conditions, you think you wouldn't fight extradition quite so hard."[99] In making this statement, the district court appears to have confused two different points made by the defense in its sentencing submission—first, that Mr. Rios Suarez was entitled under the extradition order to time served awaiting extradition, and second, that Mr. Rios Suarez should be granted a downward departure based on the horrific prison conditions and torture that he had experienced during previous incarceration in Colombia and Venezuela.[100]

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[97] A-374 at ¶ 11.
[98] A-402.

Appellant reiterates both of those arguments herein, but notes that the first point is strongly supported by the wording of the extradition order, which states unambiguously that, "the required citizen **is entitled** to recognition by the State Requiring [i.e., the United States] of the time he has spent detained by reason of the extradition proceedings."[101] Moreover, Mr. Rios Suarez obtained the necessary certification from the Ministry of Foreign Affairs and the Colombian General Attorney's Office, which stated that "YESID RIOS SUAREZ, . . . was notified with extradition purposes on February 1, 2012, and his custody was transferred to the authorities of the United States of America on April 25, 2013."[102] "The aforementioned is so that the period of time where he has been deprived of liberty in Colombia **is taken into account** in the process that is underway in the United States of America."[103]

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[99] A-501 at ln. 22 to A-502 at ln. 2.
[100] A-295-296; A-298-306.
[101] A-374 at ¶ 11) (emphasis supplied).

Just as there was no ambiguity in the extradition order that a life sentence was prohibited, there is no question that, by the wording of the extradition order, Mr. Rios Suarez was entitled to credit for the time served awaiting extradition. This credit does not depend on whether or not Mr. Rios Suarez contested the extradition. As a citizen of Colombia, he had the right to avail himself of the full protections of Colombian law and should not have been penalized in the district court for exercising his rights. The extradition order, which was entered at the conclusion of the contested extradition proceedings, specifically recognized that Mr. Rios Suarez was entitled to the credit for the full period of time during which his extradition was litigated. Therefore, the district court erred in declining to recommend that he receive credit and the case should be remanded for resentencing at which a 15-month credit for the time served awaiting extradition is included in the sentence.

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[102] A-402.
[103] *Id.* (emphasis supplied).

III. The One Million Dollar Fine Is Constitutionally Excessive.

"[T]he question whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 435, 121 S. Ct. 1678, 1685, 149 L. Ed. 2d 674 (2001) (citing *United States v. Bajakajian*, 524 U.S. 321, 336-337, 118 S.Ct. 2028 (1998)).

The Guidelines instruct that, "The Court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." U.S.S.G. § 5E1.2(a). Further, Application Note 3 provides that, "the fact that a defendant is represented by (or was determined eligible for) assigned counsel are significant indicators of present inability to pay any fine. In conjunction with other factors, they may also indicate that the defendant is not likely to become able to pay any fine." U.S.S.G. § 5E1.2 Application Note 3.

In this case, Mr. Rios Suarez, although convicted of substantial involvement in narcotics trafficking, appeared before the district court with counsel appointed pursuant to the Criminal Justice Act. There is no evidence in the record that Mr. Rios Suarez currently has the means to pay the fine. The Presentence Report confirms his inability to pay a fine, stating that, "On the financial statement, the defendant reported having no assets or liabilities, and a net worth of zero. As the defendant is presently incarcerated, he has no monthly expenses. As such, it appears that he does not possess the financial capacity to satisfy any Court-ordered monetary sanction."[104] Further, the district court has imposed a sentence that, if affirmed by this Court, will ensure that Mr. Rios Suarez will die in a federal prison and will never become able to pay the fine. Therefore, on the facts of this case, the fine imposed was constitutionally excessive and must be reversed.

CONCLUSION

The Court should vacate the sentence imposed by the district court and remand this case for resentencing before a different judge, instructing the district court to give Mr. Rios Suarez the benefit of the negotiated plea agreement and to impose a sentence that accounts for the 100-month undischarged Colombian sentence, complies with the Colombian extradition order, and does not include an excessive fine because the district court's sentence was substantively unreasonable.

[104] Presentence Report at 11 ¶ 59. Appellant acknowledges that the PSR also stated that he earned $10,000 to $20,000 per month from 2008 until his arrest by selling gasoline to narcotics traffickers. Presentence Report at ¶ 57. However, Mr. Rios Suarez was incarcerated at least since the fall of 2011, and there is no evidence that he currently possesses any savings, let alone assets that could be used to satisfy the fine.

Dated: October 17, 2014
New York, New York

Respectfully Submitted,

_/s/ John C. Meringolo_____

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2008 in 14-point Times New Roman font.

_/s/ John C. Meringolo_____

John C. Meringolo

Attorney for Appellant

SPECIAL APPENDIX

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AO 245B (Rev. 09/11) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
Yesid Rios Suarez

JUDGMENT IN A CRIMINAL CASE

Case Number: 11-cr-00836-KBF-2

USM Number: 92000-054

John C. Meringolo
Defendant's Attorney

THE DEFENDANT:

☑ pleaded guilty to count(s) One (1)

☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.

☐ was found guilty on count(s) ____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:963=CI.F	ATTEMPT/CONSPIRACY - CONTROLLED SUBSTANCE - I	9/29/2011	1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ____

☐ Count(s) ____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/27/2014
Date of Imposition of Judgment

K. B. Forrest
Signature of Judge

Katherine B. Forrest, USDJ
Name and Title of Judge

6/27/14
Date

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: JUN 27 2014

AO 245B (Rev. 09/11) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: Yesid Rios Suarez
CASE NUMBER: 11-cr-00836-KBF-2

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

648 Months

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____________ ☐ a.m. ☐ p.m. on ____________ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on ____________ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ____________ to ____________

a ____________ , with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ____________
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Yesid Rios Suarez
CASE NUMBER: 11-cr-00836-KBF-2

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 1,000,000.00	$

☐ The determination of restitution is deferred until ________ . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $ ________

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Yesid Rios Suarez
CASE NUMBER: 11-cr-00836-KBF-2

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

Forfeiture traceable to the offense is Ordered. Government to submit proposed order, if applicable.

A fine in the amount of $1,000,000.00 is Ordered.

DEFENDANT: Yesid Rios Suarez
CASE NUMBER: 11-cr-00836-KBF-2

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than ____________, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of $ ________ over a period of ________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of $ ________ over a period of ________ *(e.g., months or years)*, to commence ________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ________ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 11 Cr. 836 (KBF)

YESID RIOS SUAREZ,

Defendant.

------------------------------x

New York, N.Y.
June 27, 2014
3:10 p.m.

Before:

HON. KATHERINE B. FORREST,

District Judge

APPEARANCES

PREET BHARARA
United States Attorney for the
Southern District of New York
ADAM FEE
SEAN BUCKLEY
Assistant United States Attorneys

JOHN MERINGOLO
ANJELICA CAPPELLINO
Attorneys for Defendant

ALSO PRESENT: MIRTA HESS, Interpreter (Spanish)

(Case called)

MR. FEE: Good afternoon, your Honor. For the government, Adam Fee, and with me is AUSA Sean Buckley.

THE COURT: Good afternoon, both of you.

MR. MERINGOLO: Good afternoon, your Honor, John Meringolo and Anjelica Cappellino for Yesid Rios Suarez.

THE COURT: Good afternoon to both of you. The Court notes that Mr. Rios Suarez is present and here in court this afternoon. Good afternoon, sir.

We are assisted today with the services of a Spanish interpreter and I see, Mr. Rios Suarez, that you are using the equipment. If at any point in time that equipment is not functioning right, then let Mr. Meringolo know or just make a motion to the Court and we will get it fixed. Sometimes the batteries can run out. And we want to make sure that you are able to hear every word. All right?

THE DEFENDANT: Okay. Yes.

THE COURT: We are here today for the sentencing of Mr. Yesid Rios Suarez and I want to first start out by reciting for the record the materials that I have received in connection with this proceeding. I have read them thoroughly and they were extensive, but I do think that it laid out a variety of issues that are useful to have laid out, and we will go through them, but I warn you all, this may take a little while.

I received a copy of a defense submission, it was 87 pages, dated May 23, 2014, and attached to that submission was a compendium of a number of exhibits, a couple of dozen exhibits, including letters from family and friends, as well as some additional supportive material to which Mr. Meringolo referred in his submission.

He also sent the Court a copy of his objections to the PSR, which is a letter dated June 11, 2014. A number of those objections had not been reflected in changes by probation, though probation refers to that letter and explains their rationale, and we will go through those as well. And Mr. Meringolo also made a third submission, which is a reply to the government's submission, and that's dated June 16, 2014, and there are an additional seven exhibits attached to that. I've got all of those, and we are going to go through those in a little bit.

Separately the Court has received a copy of a presentence investigation report. That is referred to as a PSR.

Mr. Meringolo, did you have an opportunity to review the PSR with your client?

MR. MERINGOLO: Yes, I did.

THE COURT: And do you have objections to the PSR apart from those which you set forth in your submissions?

MR. MERINGOLO: None other than them.

THE COURT: We will go back over that in a moment.

The PSR notes an offense level of 43 and a criminal history category of I. The PSR will be made part of the record in this proceeding. It will be filed under seal. If an appeal is taken, counsel on any appeal may have access to the PSR without further application to the Court.

The government also made a submission dated June 9, 2014. Now, I've thought about procedurally how we ought to proceed. And what I thought may make the most sense is to first take Mr. Meringolo's letter of June 11, go through it.

Then what I would like to do is, I will explain to you which factual findings I'm adopting in the PSR. Then what I'd like to do is to go through a number of the other issues which relate to the offense level calculation before we get to statements because my view is many of the arguments that people may want to make may be embedded in what the Court determines as to whether the evidence is supportive or not supportive of some of those facts. So rather than having ships passing in the night, I'd like us all to be on the same page in terms of where my head is.

That's my plan. I will let counsel then respond to the offense level calculation first. We will then reach resolution on that. Then go to statements of counsel and then to Mr. Rios Suarez, if he would like to address the Court before sentence is imposed.

Does that seem like a reasonable way to proceed?

MR. FEE: It does, your Honor. Certainly seems the most efficient.

MR. MERINGOLO: Yes. Thank you, your Honor.

THE COURT: Let me just take Mr. Meringolo's letter first.

MR. FEE: Your Honor, I'm sorry. I will just note and apologize. The government submitted a letter to probation responding to Mr. Meringolo's letter. It did not copy the Court. It should have. It really will add nothing. It mostly cited your prior order, just so the Court knows.

THE COURT: That's fine.

If you want to make some comments, we will take the letter first. If you want to make comments afterwards, before we get to the other matters, then you can.

Several of the objections were supported by the Court's factual findings which were made by a preponderance of the evidence in the Fatico. But certain statements were not. Paragraph 8, I believe, should remain unchanged because it's supported by factual findings and testimony, not only findings in my decision, but can be supported and I do find that it's supported by a preponderance of the evidence based upon testimony and other evidence adduced at the Fatico.

This is also true for paragraph 9, as well as for paragraph 10 and 11. There are facts which were adduced during the Fatico hearing which are supportive of those statements by a preponderance of the evidence and I so find.

However, I do find that paragraph 12 and the next paragraph, which is labeled 13, which is, in fact, a piece of 12, and so I have noted, that's not actually paragraph 13. It's a paragraph 12, I believe. So 12 and 12.

I do agree that those two are not directly supported in the manner in which they are worded in the PSR. We are going to talk about other facts which get at many of the same points and these, frankly, do not affect the offense level calculation and we will talk about that. This is really, I think, more of a wording issue in terms of how probation decided to refer to certain facts. But I do agree that those two should come out. And then I similarly find the same for what's referenced on page 2 of Mr. Meringolo's letter as paragraph 14, which should be changed to paragraph 13. That's a reference to paragraph 13 in the PSR.

It is possible that the PSR changed numbers between the first draft and what I have seen and that Mr. Meringolo's letter may have referred to a prior draft. In any event, it is the second, third, and fourth paragraph on the pages where I will agree to strike the referenced language. That will be noted for probation and that should be -- Ryan, you should make sure that Joe knows that, to put that on the equivalent of a blue card.

Paragraph 15 and paragraph 16, those are supported by the facts adduced at the Fatico hearing. That's the Court's findings as to Mr. Meringolo's letter.

Mr. Fee, is there anything in particular that you want to say about the Meringolo letter? Let me suggest, it's possible that you may want to hear the rest of what I have to say to figure out if it changes in any way your view. In other words, I think we come to the same point in terms of the overall conduct, whether it's worded in terms of a particular person or not.

MR. FEE: I have nothing to add right now, your Honor. Thank you.

THE COURT: So the Court does adopt the factual findings of the PSR with those amendments as stated.

Moving on to the next point, what I want to do now, as I said, is go through certain aspects of Mr. Meringolo's filing and give you my rulings on the various points raised. But I want to also state that I would like to hear comments from you, if you want to make comments afterwards. And it's not that I'm suggesting that I wouldn't change my mind if counsel raised something that suggests that I have erred in some way.

These are my rulings in the absence of you folks convincing me otherwise. First, I want to deal with the burden of proof issue, which is one that goes through a number of different pages of Mr. Meringolo and is particularly relevant to the quantity argument.

Mr. Meringolo suggests that the burden of proof is beyond a reasonable doubt versus preponderance of the evidence. I do not agree. I believe that that it is taking the Gonzalez case, which is 420 F.3d 111, and the Apprendi case too far. There have been arguments similar, frankly to that which Mr. Meringolo makes, and I don't fault him for making the argument. But it is no longer supportable in the case law.

The argument is that a court which makes a finding relating to an offense level that increases the offense level to a point which raises a statutory maximum or even a statutory minimum must be found by a beyond a reasonable doubt standard. In the pre Booker world that was obviously much more important because if the offense level changed as a matter of statutory equivalence, that would change the range within which a defendant had to be sentenced. It is nonetheless still important to the extent that there are statutory minimums, for instance, in our situation attached to certain crimes.

If it were the case that the evidence relating to the imposition of the statutory minimum or maximum was something which had not been allocuted to, as it has here, or otherwise in a trial with respect to, there could be an issue as to whether it is by a reasonable doubt, beyond a reasonable doubt or preponderance. In such a case it may well be a beyond a reasonable doubt standard.

Here, however, the only statutory minimum issue that we have has been allocuted to, which is the five kilos, which provides the basis for the imposition of the statutory minimum. We don't get to a statutory maximum here and so, therefore, the other aspect is not relevant.

The law is clear that where the facts which are at issue are simply going to the offense level calculation and is not otherwise impacting a statutory minimum or maximum, that that is proven by a preponderance of the evidence. There are two cases which actually deal with arguments very like Mr. Meringolo's from the Second Circuit directly on point. One is the Lighten case, 525 Fed. App. 44 pin cite 48, (2d Cir. 2013), and also the Vaughn case, 430 F.3d at 518 at pin 525 (2d Cir. 2005).

The calculation of the offense level for Mr. Suarez in this situation, the facts that we are dealing with for the enhancement and for the quantity are facts which we find by a preponderance of the evidence. Mr. Rios Suarez himself allocuted to five kilos or more. He allocuted to the minimum. And, therefore, there is no debate as to that. That's not contested. That's the first issue I wanted to deal with.

The second issue that I wanted to deal with is the calculation that we are going to get through. It's going to be several different pieces that will go to the quantity. The quantity actually in many of the arguments in the defense submission stem from arguments about the defendant's role. And

I did find in the Fatico decision by a preponderance of the evidence that the defendant, his role was of a leader.

Now, the defendant has argued, based upon his allocution at the plea, that his role in the conspiracy was really a relatively minor role. In fact, he is given two different examples or characterizations of his role. I would note that his allocution went into his role when it didn't have to. It wasn't an element of the offense. He chose to do so. He was under oath at the time. And he allocuted to simply filling the plane with fuel, actually planes because he also stated that planes, in the plural, went to the Southern District of New York.

He separately then, in his defense submission and also in the PSR, stated that he sold fuel to a drug trafficking organization from which he made 10 to $20,000 a month. So those are the two different roles.

I actually find that neither of those roles are credible based upon a preponderance of the evidence. However, if one credited his view of his role, then he would have been a low member of the conspiracy to whom the quantities might be different and the various enhancements might well not apply.

So his arguments as to enhancements in quantity really flow ultimately from, in large part, but not exclusively, the Court's determination as to his role. Again, it's not an element of the offense and, therefore, his role the Court can find by a preponderance of the evidence, and I do find that he was a leader in this drug trafficking organization.

I make that finding based upon the evidence adduced at the two-day Fatico hearing which we had. The Court heard at that time from two credible witnesses whose testimony I actually credit in all respects. That is Mr. Garzon Garzon, and Mr. Ramirez-Pajon. I think that's right. And that those individuals both testified credibly that Mr. Rios Suarez was a leader of the drug trafficking organization and they gave some details relating to their interactions with him in that regard.

I don't intend right now to go back all over the factual findings which I made in the Fatico. I would note that those findings were all made by a preponderance of the evidence, as I stated in that decision itself.

I find, in addition, when Mr. Rios Suarez was a leader of that drug trafficking organization that he was involved in essentially all aspects of that conspiracy. He was knowledgeable by inference, by reasonable inference drawn from his role and drawn from the role which was testified to by these two credible witnesses to have any knowledge of the various activities of the conspiracy and, in particular, of the manufacturing and distribution operations of that organization.

The Court does find by a preponderance of the evidence that he would have understood that there was cocaine being manufactured in the laboratories on site in substantial quantities, that there were armed guards who were present in and around that facility, that there were airplanes which were used and filled with the cocaine which then flew to various destinations, including, among others, the United States, but as to which even as to the others, the United States was typically a destination. As Mr. Garzon testified, the vast majority of the cocaine was destined for the United States.

So I do find that Mr. Rios Suarez was not, in fact, telling the truth during his allocution. That does present some issues in terms of a potential obstruction of justice enhancement which has not been raised. Under the guidelines for enhancements, obstruction of justice can be imposed for not telling the truth, for lying to the Court in the context of either a sentencing submission or otherwise.

I decline, though I think I could, to impose an obstruction of justice enhancement. I just note it as a possibility. It's a cautionary tale for those individuals who put more facts into their allocutions than they need to to establish the elements of the offense to which they are allocuting. If the Court later determines that there was a statement under oath with which it does not agree and it was not necessary to establish an element of the offense, then that fact can be used in the manner that I have described to support an obstruction of justice enhancement.

Let me move on to the quantity. This brings us now to the quantity and there is quite a bit of argument, as there should be in this kind of case, because the quantity really drives the base offense level. So I think, by the way, that these arguments are appropriate. I think they are suggestive of Mr. Meringolo having raised a number of issues, which this case is all about the appeal. This case is all about establishing the appropriate record for Mr. Rios Suarez if he wants to take an appeal. And so I think that Mr. Meringolo, I don't fault him at all for having raised these arguments. I say that because I know this is going to take a while, again. I'm smiling.

In the Fatico decision I found that the defendant had been involved in a conspiracy that involved thousands of kilos of cocaine, and I laid out the facts in that Fatico decision. I confirm those now, but I want to confirm something else. I want to confirm foreseeability in particular by this defendant of the thousands of kilos. I went back into the Fatico decision and did not find a particular reference to foreseeability by the defendant.

Quantity can be determined in two ways. It can be determined both by foreseeability of an individual who is participating in a conspiracy. It can also be established by direct participation. Here we have evidence of both and it matters really not at all whether we do one or the other. Even based on Mr. Rios Suarez's own allocution to having filled planes with fuel, the planes were testified to credibly here during the Fatico by Mr. Garzon Garzon to hold several hundred kilos apiece. So even filling one plane with fuel that had several hundred kilograms of cocaine would be sufficient to establish the base offense level that we are talking about, even with the guideline amendments that will occur in potentially September of 2014.

However, there is more than that. I make the further determination that because the defendant was directly involved and it was reasonably foreseeable to him as a leader of this drug trafficking organization that the drug trafficking organization would have manufactured and distributed more than 150 and indeed more than 500 kilograms of cocaine.

As I stated, I base that finding on his role. He was one of two primary leaders. I think that his nephew was probably the bigger leader of the two. That's only based on the characterization of the evidence. You can have one big leader and you can have another leader, or you can have two leaders of the same level. He was a leader, nonetheless. All evidence is supportive of him having been involved. He was responsible for manufacturing aspects of the cocaine. He certainly would have known how much they would have manufactured. I find by a preponderance of the evidence that he was involved in the manufacturing of the cocaine.

There was credible evidence that he was involved in deals with Mr. Ramirez Pajon that involved thousands of kilos of cocaine. He himself allocuted to there being planes, not one plane, but many planes. And all of the evidence, again, points by a preponderance of the evidence to there being thousands of kilos and I so find.

The defendant also argues that he should have only attributed to him the amount of cocaine as to which the evidence supports U.S. distribution. And I found this as a somewhat interesting issue.

So it turns out that the Second Circuit has carefully discussed the Azeem case, 946 F.2d 13 (2d Cir. 1991) in a manner in which they determines did not overrule it, but, in fact, suggested it's not really the law as they see it.

In any event, I find that the case here, the situation here is sufficiently distinguishable from Azeem that Azeem would not apply. Let me know go back over that. As an initial matter the Court does not think and no party has raised that there is any question that it has jurisdiction over this case. This is a conspiracy, the conduct of which involved directly involved the United States. It involved bringing cocaine into the United States. The defendant himself allocuted specifically to distribution in the United States. There also, of course, was testimony as to the conspiracy.

But the question goes, I think, to whether or not, under the Azeem case, somehow the quantity of drugs which are outside of the United States can be attributed to the defendant for purposes of calculation of amount.

Now, under 2D1.1, application note 5, if there is no seizure, then the Court is to approximate the amount of drugs. I would also say see also U.S. v. McLean, 287 F.3d 127, 133 (2d Cir. 2002). The Court does that as set forth there by a preponderance of the evidence.

Now, in Azeem there was an indication there and it was an odd case because it happened while the defendant had had some conduct preguidelines, and then he was arrested and suddenly the guidelines were in place and there was one set of conduct in the United States that occurred at one time frame and another set of conduct that was outside of the U.S. at another time frame. One can reasonably wonder how those particular circumstances impacted the Court's determination. But there there was language which indicated that distributions which were not found to have been in the United States may not be attributable to the overall quantity calculation.

That, however, has been specifically clarified in the U.S. v. Greer case, which is 285 F.3d 158, 179 (2d Cir. 2002). There, in U.S. v. Greer, the Second Circuit made it clear that the Azeem case is really limited to "foreign crimes" and that is the language with the Azeem case stated.

In U.S. v. Greer, indeed the Second Circuit found that in a conspiracy where there was a defendant being prosecuted in the United States, it was, in fact, error requiring resentencing to fail to include quantities that were distributed in foreign jurisdictions.

Here, the Court notes this precedent and I, therefore, suggest that irrespective of where the cocaine was distributed, whether in the U.S. or whether outside of the U.S., it is all part of the overall conspiracy here and, under U.S. v. Greer, is includable.

Nevertheless, the Court makes the alternative finding that there is a sufficient amount, in any event, to reach the same base offense level if one is to take only the approximation under 2D1.1, application note 5, which allows the Court to approximate the quantity based upon the testimony, for instance, of Mr. Garzon, which would be itself in the thousands of kilos. He said the vast majority reached the United States. If one takes even 51 percent and so takes a mere majority of that quantity, one reaches, let's just say that thousands of kilos equals only 3,000 kilos and one takes only something over 1500 kilos. One is nonetheless well north of either 150 kilos for a base offense level of 38, or 480 kilos or 500 kilos, or perhaps revised quantity tables under the Smarter Sentencing Act, which would increase the quantity to get to a base level of 38.

Whether the U.S. only quantity is included or whether the U.S. plus foreign quantity is included, we end up at the same place because the quantities are so vast that we end up, however we divide it, still north of that which is required to reach the base offense level.

Also, Mr. Ramirez-Pajon himself talked about various loads and, of course, he talked about Puerto Rico being one of the destinations of that. So I find by a preponderance of the evidence that under any determination there are over 500 kilos attributable and, in fact, thousands.

Let's go on to the enhancements. The defendant argues that the Court should not impose enhancements relating to leadership role, use of an airplane other than a regularly-scheduled commercial flight, use of a firearm, direction of the use of violence, criminal livelihood. And the Court dealt with these issues in the Fatico decision. I reiterate that I found that each of these was appropriately and sufficiently supported by facts which I found by a preponderance of the evidence.

Now, the defendant also argues that he should obtain the two-level downward adjustment based upon the potential Smarter Sentencing Act and the potential downward adjustment and quantities. But this is often something taken into consideration during plea negotiations. And here, of course, that's a whole other issue, but that is not something which has resulted in it.

However, given where we are with the overall offense level, that two-level downward adjustment would be applied to the overall calculation prior to the Section 5, application note 3, I think it is, which says that you have an offense level that is higher than 43, you bring it down to 43. Here we end up at 50, or you can say we end up at 48, or you can say we end up at 46. Either way, once you take off the two points, no matter what happens, you never end up north or at 43. The Holder two-level adjustment doesn't actually affect in any way the overall offense level.

I am going to go to the calculation based upon those findings and tell you about the calculation.

The defendant argues strongly that the calculation that the Court imposes should be based upon that which was extended to the defendant during an earlier plea offer set of negotiations, that the defendant, on the day that the plea was to expire, changed counsel. Mr. Meringolo came in. These are CJA appointed counsel in both instances, that Mr. Meringolo did not have sufficient time to acquaint himself with the facts. He moved with alacrity but was unable to recommend to his client that his client take the plea agreement before the period of time in which he did so.

I'm not suggesting that Mr. Mention's actions should have been different than they were, but I would suggest that the premise of ineffective assistance up until that point is inaccurate. Let me describe for you why that is so. As an initial matter it's important to note that even if there had been a plea agreement here and even if that plea agreement had been one which Mr. Rios Suarez had pled to, the Court always retains its own discretion to make a sentencing determination that it deems appropriate under the various factors of 3553(a). The Court is not bound by a plea agreement. The Court is not bound by the stipulated-to offense level. The Court is not bound by the stipulation between the parties as to what enhancements do or do not apply. This Court has found in the past and then affirmed by the Second Circuit government on the application of enhancements, which neither party has sought and which the defense has specifically objected to in the context of the Court applying enhancements not agreed to as part of the plea agreement.

The Second Circuit in cases in which I have been involved and also in a number of other cases has reaffirmed the very basic proposition that the Court is not bound by a plea agreement and the Court has an independent obligation to calculate the offense level and otherwise to make both an objectively and substantively reasonable determination as to the appropriate sentence.

I say that because irrespective of the plea agreement arrived at, it would not have placed the defendant in any position other than that in which he is placed today. Therefore, he suffers no prejudice because the Court would have gone through the same analysis today that it is, in fact, going to go through as it would have under either the current set of circumstances, where defendant pled to the indictment and that in which the defendant had the benefit of a plea agreement, which suggested to the Court a stipulated offense level and did not have enhancements included.

In addition, let me just say that according to 3553(a), even today, the sentence will be determined based upon the Court's decision as to a sufficient but not greater than necessary sentence, and that is done, frankly, irrespective of the guidelines. It's done taking the guidelines into account. They are advisory only. I do not assume that the guidelines are necessarily reasonable for any particular defendant. I use them as a guidepost and I consult them as I need to do, but ultimately what the plea agreement says about the guidelines is only one of several factors that the Court takes into consideration in its 3553(a) analysis.

Getting to the plea discussions, the defendant concedes that a plea offer was extended to him. Typically, when ineffective assistance of counsel is raised in the context of plea issues, it's a situation in which a plea offer has not been extended or the terms of a plea offer have not been fully explained or in which a counsel has, for whatever reasons, determined not to recommend one way or another the acceptance or rejection of a plea offer.

Those are the typically the three bases on which ineffective assistance of counsel claims are based in the context of plea discussions, and I refer you to U.S. v. Brown, 623 F.3d 104 at pin 114. It's the Second Circuit case, 2010.

In cases with respect plea discussions and ineffective assistance of counsel claims are found to have been joined, that issue has been joined, the Second Circuit indicates that the appropriate remedy is to ensure the defendant is placed back into a position which he would have been in had the plea offer been extended.

I have suggested to counsel now that, frankly, the defendant is in no worse position today because of the 3553(a) analysis driving my determination in the fact that I would have and would always consider the very same enhancements that we have and we will discuss today, irrespective of the plea agreement, so the defendant is in no worse position.

In any event, putting that aside, the chronology here does not support, in the Court's view, ineffective assistance of counsel. It's clear that a plea offer was made, but the terms of the plea offer were translated into Spanish. That was discussed specifically on the record and that the defendant, for whatever reason, chose not to take the plea offer at that time.

Indeed, Ms. Aubrey Lees, who was counsel at that time, indicated that it had been discussed a number of times with

Mr. Suarez. So this is not a situation in which the offer was not extended, where the terms of it were conveyed. It's that Mr. Meringolo was more persuasive than Ms. Lees or, for whatever reason, the defendant himself decided to take it at one point but not at another. That's not ineffective assistance. That's not the basis for an ineffective assistance claim. That's the basis to suggest that for whatever reason the defendant made a determination at one point in time and not at the other.

But the government has every right to set deadlines. They had every right to stand by the deadline. And the fact that Mr. Rios Suarez had not accepted the agreement by a particular point when the deadline expired, that does not an ineffective assistance of counsel argument make, even though counsel changed. That was known on that day. He could have accepted it before Ms. Lees transferred off. She was not replaced because of any kind of incompetence. She was replaced for all of the reasons that were set forth on the record that I won't go over now. I do believe that she was competent and responsible in her conduct as the legal representative of Mr. Rios Suarez.

There is the further issue of the public policy implications of the Court finding that a defendant by merely switching counsel can get the benefit of an extension of a plea offer. That would be the Court imposing itself into the plea negotiations in a way that would have broad policy implications for the U.S. Attorney's Office. It's not appropriate for the Court generally ever to participate in the plea negotiations, so I decline to find that I should have in any way here.

Let me address acceptance of responsibility. The defendant argues he should be entitled to a three-level reduction, which includes both a two-level reduction under 3E1.1(a) and (b). As we all know, you only get the 3E1.1(b) reduction if you get the 3E1.1(a) reduction. I do not find that the defendant gets a 3E1.1(a) reduction and, therefore, he's not entitled to the (b) reduction.

The reason for that is the fact of a plea does not ipso facto in and of itself guarantee that a defendant will get an acceptance of responsibility adjustment. There has to be a clear acceptance of responsibility.

Here, the defendant has himself come up with a couple of different reasons, different explanations as to his role and, in fact, has spent quite a bit of time both at the Fatico and his very extensive submissions here arguing as to why he doesn't have the kind of responsibility that he has.

So there is ample reason, extensive reasons why he is not entitled to any acceptance of responsibility under 3E1.1(a). So he doesn't get not only the one, but he doesn't get any of the three. I find that fact by a preponderance of the evidence. He simply didn't truthfully admit his conduct.

He also argues for departures based on his age and family. In fact, he doesn't have particularly unusual circumstances as to age or family. The defendant is 46 years old. That's not particularly old. He has got a family. It's no doubt tragic that he is not there for them. He has got a son who has got some health issues. That unfortunately, while sad, is not particularly unusual, and I decline to depart for those reasons.

Based upon all of the above and everything that I have said so far, the calculation as to offense level is as follows: The base level I find is under 2D1.1(c)(1) is 38. That is 150 kilograms or more. I would note that as I found under a preponderance of the evidence, even with the proposed adjustments under the Smarter Sentencing Act, under the findings I have made, the offense level would be 38, even next year. A dangerous weapon was possessed. I found that in the Fatico, and I reiterate that now. Under 2D1.1(b)(1), that is a two-level enhancement. He directed the use of violence under 2D1.1(b)(2). It's another two-level enhancement. That's something that we again found in connection with the Fatico.

He imported cocaine with the use of a non regularly scheduled aircraft that was dealt with in the Fatico under 2D1.1(b)(3). It's another two-level enhancement. He was directly involved in a pattern of criminal conduct. I found that as part of the Fatico under 2D1.1(b)14(C) and (E). It's another two-level enhancement. He was a leader of the organization and under 3B1.1(a), that's a four-level enhancement.

All together, that leads to an adjusted offense level of 50. Under 5A, application note 2 -- it wasn't 3, as I previously said. It is 2. As I see it now in my notes and I'm not reciting it from memory -- if the total offense level exceeds 43, it becomes 43, so it's 43.

Now, the Court notes that even if I had deducted two levels for the Smarter Sentencing Act, it would be 48, because it would have started with 50 and it would be 48. In addition to that, if I also gave three points for the acceptance of responsibility, it would go from 48 to 45. We would still end at 43, criminal history category of I.

Counsel is welcome to comment now on any of the above. We will go on to the 3553(a) any mitigation statements in a moment. Let's deal with any comments you have on these arguments. I note that by not commenting now as to particular points, it does not waive them. Your submissions are part of the appellate record and so you don't have to regurgitate all of the argument. If you think I've gotten something wrong as a matter of law, I would certainly like to hear about it.

Mr. Fee.

MR. FEE: Your Honor, the government has no comments and notes that the calculation as pronounced is correct, in our view.

THE COURT: Mr. Meringolo.

MR. MERINGOLO: No, your Honor. We will rely on the papers.

THE COURT: Thank you.

Let's go on to counsel's statements. I think that I'll deal with some of the other points: The Colombian conviction, the extradition letter, unwarranted sentencing disparities, and credit for time awaiting extradition. I'll deal with those in my comments.

Let's go on now to what you have to say, Mr. Fee, Mr. Meringolo, and Mr. Rios Suarez, if he would like to address the Court before sentence is imposed.

Mr. Fee.

MR. FEE: Thank you, your Honor. I will remain brief. The Court has obviously immersed itself in this case.

I'll speak principally as to the factor we stressed in our submission under 3553, specifically the seriousness of the offense, the need to promote respect for the law, and to impose just punishment.

Put simply, your Honor, this defendant is exceptional, both in the sense of the crime he committed and in the broader sense of the types of defendants who find themselves in a U.S. Court subject to punishment.

This defendant was immersed at the core of the international drug trade for years, your Honor, decades, really. And what he did, along with his cousin and the rest of their coconspirators, including, many, many employees, as this Court heard, was managed a vertically integrated, extensive, both in time, geographical area, and scope, and sophisticated drug trafficking organization.

It went from the ground to the air, meaning through an alliance with the FARC, guerrillas, a guerrilla group in Colombia, they were able to obtain crops, coca plants from farmers in Colombia, process them in labs first in Colombia that were overseen by this defendant and others in his organization, take what was processed in those labs, cocaine, hydrochloride or powder cocaine, move them over land, and put them on planes and send throughout the world, including most of the time to the United States, your Honor. This is how cocaine gets to the streets.

This defendant and his work is how it results in addiction, to street gangs dealing cocaine or crack. This is how it gets there, your Honor. And the hallmarks of the extremely serious nature of this offense are reflected here in this defendant, meaning that the reasons why drug laws in the United States or penalties for drug offenses in the United States are so serious, specifically why penalties for the importation of cocaine do present some of the more significant punishments in our system, are seen in this defendant's conduct.

Number one, as I discussed, the scope of his organization was immense. Thousands of kilograms of cocaine that this Court has found and, as the witness have testified to, shipped out of Colombia and Venezuela, through various shipping points and sometimes directly to the United States, millions of dollars of proceeds coming back to this defendant and his cohorts. You heard testimony about that as well, that the money always came back on those planes in the form of U.S. dollars and that these deals were lucrative for Mr. Ramirez-Pajon as well as Mr. Garzon Garzon. There was a lot of money flowing back to the defendant and that's why he did all this.

Beyond the organization, your Honor, the alliance with other criminal organizations. Here it's the FARC. It's one of the reasons why this is just about the most serious drug offender I could imagine coming before this Court.

In order to do this, meaning to engage in an extended conspiracy to manufacture and transport cocaine, this defendant made a deal with the devil, so to speak. He aligned himself with a group in Colombia that is a terrorist group, as designated by the U.S. State Department and as really practically you can see even from the evidence in this case. It's a group that used violence to impose control over broad swaths of Colombia and it used the drug trade and alliances with people like Mr. Rios Suarez to enrich that group.

And Mr. Rios Suarez embraced, as you heard, the FARC. He had meetings with the most senior leaders of that group. He allowed them access to the air strips that he used to transport cocaine and sometimes to the laboratories that he used to manufacture. And he continued to have as his calling card in this conspiracy the fact that he was able to manage a relationship with and to form alliances with these guerrillas who were violent and working against the government of Colombia in the most flagrantly violent ways, as this Court heard.

I think that's the final hallmark of the extremely serious nature of this offense, is violence. This defendant embraced, sometimes in a casual manner, the use of violence to protect his drug business. You heard testimony about this that we submit was credible and both striking in the things this defendant did throughout his life to maintain the sanctity of his business and to ensure that no one else would be interfering with it.

You heard about the most extreme forms of violence, this defendant directing others to murder innocent people. When I say innocent, all murders are extremely serious, but people who essentially happened upon this defendant, organizing or working together with the FARC to carry out an attack on a Colombian pipeline. And these, as the testimony characterized, were simply farmers. And this defendant elected at that time to tell others to murder those two men, and they were murdered.

You heard other examples of the violence suffusing this defendant's criminal career, including being involved in the transport of ransom payments for kidnappings that had been carried out by the FARC and then payments brokered by this defendant to get back to him related to this conspiracy in the broader sense, that it was part and parcel his relationship with the FARC, and those guerrillas were the drug partners.

You heard also about weapons, this defendant possessing them and others possessing them. Of course, as I referenced, the concluding moment of Mr. Garzon Garzon's work as a confidential source was this planned bombing. And this was the level of power and hubris and sort of greed that this defendant reached at his time in Colombia, that first chapter of his career, that he was actually working with the FARC to drop bombs on Colombian military and oil pipelines, the thought being that dropping them on the pipeline would distract the military from his narcotics trafficking operation in the same region and, more directly, attacking the military would limit their effectiveness in narcotics interdiction efforts.

Your Honor, these are all comments about the record. The Court is certainly well aware of the record. The reason I recite some of is this is to emphasize and to highlight that that is a rare opportunity to have a man like this defendant sitting in a U.S. courtroom, somebody who we can actually say for years and years and years engaged in a conspiracy to spread cocaine throughout the world and including into the United States, purely for profit and to do it in an incredibly callous matter, meaning he adopted violence as one of the tools of his trade, and we have heard a few instances. But it is fair to infer that this was customary for Yesid Rios Suarez and his coconspirators both in Colombia and Venezuela, when they were running this drug trafficking organization.

I will just briefly touch on some of the arguments I expect Mr. Meringolo to raise on his behalf. I'm not going to go into detail on factual arguments made by defendant through Mr. Meringolo, and I think the Court has hit this squarely, even just taking the defendant's statements, either through his counsel to probation or in allocuting his guilt to this Court, he is simply not credible.

And I do think it is appropriate that the Court deny him credit for acceptance of responsibility, because he has not accepted responsibility. In fact, he has attempted to divert this Court's attention from the actual evidence in this case and the actual crimes he committed.

And I bring that up to highlight that this is not a man or person for whom this Court should impose a sentence in light of the consideration of mercy. This defendant spent years committing crimes, serious crimes, including murder, use of weapons, and, of course, trafficking cocaine. He now finds himself in a position where it is time to be called to account for what he has done.

And his response is not to direct his comments to the substance of his crimes or even to ask the Court plainly for some amount of mercy. It is, instead, quite frankly, to lie and try to push the Court away from what it now knows to be true.

Your Honor, we would ask that based on all of the 3553(a) factors that this Court impose a sentence well in excess of 360 months, which is a number we only use because it is the bottom end of the top guidelines range. It is appropriate in this case, both based on what this defendant has actually done and this Court has learned through the evidence adduced at the hearing, as well as to send a clear signal about what it means for someone like this defendant, who worked for so long to do so much wrong, to be held to account in a United States court. Thank you, your Honor.

THE COURT: Mr. Meringolo.

MR. MERINGOLO: Thank you, your Honor.

Mr. Fee offered my client a plea which would have been 168 to 210 months. Unfortunately, at that time I was not competent to advise my client, which I did so, to take that seven days later.

But after that plea offer that Mr. Fee gave my prior counsel and my client, the evidence that he started to gather to prosecute this case for trial was he interviewed -- I believe he went to Colombia and he interviewed a member of the FARC. And that member's name was Sofia Cardona. And what Sofia Cardona told Mr. Fee is a blatant contradiction to what he just proffered to the Court. She told Mr. Fee that my client was not a member of the FARC. She told Mr. Fee and Mr. Fee wrote down that Commander Grand Nobles had a debt. My client had a debt to Commander Grand Nobles. And she went to collect that debt on behalf of the FARC as a member of the FARC.

Mr. Rios Suarez, and this, I believe, is in the handwritten notes from Mr. Fee, Mr. Rios Suarez began to cry and he offered his 200 dairy cows, two farm tractors, two trucks, two horses, water tanks, and construction equipment. If this man was in the drug business for all these years, he had no access to money, he had Commander Grand Nobles send a member of the FARC to his house, put his life and his family in jeopardy.

Also, if he was so powerful, your Honor, if he was so powerful, what's evident here is his brother was killed from the FARC, his brother-in-law and his nephew were kidnapped and disappeared. They bombed his mother's house. They kidnapped his brother.

If this is what we are saying is equivalent to Pablo Escobar, these things do not happen. Maybe he gets killed. He didn't pay that debt. He did not pay that debt to the FARC.

And what happened? Honestly, I've dealt with criminals my entire life. I may be duped. I don't know what else to tell the Court. I know the Court didn't accept responsibility for what my client said. But this is evidence that we have here, your Honor.

This gentleman, Mr. Garzon Garzon, although the Court deems credible, and in this case, under the Extradition Act, the Court can only sentence my client from 1997 until, I guess, present day, my client was in jail for three years from the beginning of 1998 to 2001 and then on house arrest.

Mr. Garzon stopped cooperating in 2001. He was taken off the street. And then we had the next witness that your Honor heard. He only dealt with my client in Venezuela from 2007 to 2008. We have these things. It defies logic and common sense. It's bizarre how the government can come and literally have allegations and just drop somebody in there.

This is not an individual that's ordered murders. You will see all the letters. We are dealing with the entire family through a translator. These are decent people. These letters are well written. We are not saying he's an angel, and he's not. But these murders and this violence. Across the board people that we have spoke to that maybe we couldn't put letters in or represent. This is obscene, what's going on here as far as the violence, your Honor.

I think when we take into consideration all the 3553(a) factors, and, like I said, the family, I think that should be taken into consideration. The sentence the government wants, he will never see his family again. I hope that's taken into consideration.

The torture that he received in both the prisons, both in Venezuela and Colombia, it's heavily documented that this occurs. It's heavily documented that there is many, many deaths. My client was subjected to intense torture, and all the family, this multi million dollar trafficking organization, all his wife could come up with, after getting from all the family members $12,000. He was on the brink of death and that's all they could come up with. Now he has made all these hundreds of millions of dollars, according to the government. I think that's preposterous.

I also would like the Court to take into consideration that Mr. Garcia, a/k/a Camillo, and I believe Mr. Garzon said that he was a member of the FARC, a high-ranking member, and in this particular situation the boss of my client, he goes to trial in the United States. He loses at trial and he gets 24 years. I respectfully request the Court not to sentence my client more than somebody above him who went to trial and lost. We tried our best to come in before this Court and accept responsibility. We have tried our best not to prevent the trial. I don't know if we are going to discuss the three years he did from '98 to 2001 and the 100-month conviction from what we deem, your Honor, is virtually the same crime as we are prosecuted here. Mr. Garzon was a key witness during that time. He didn't testify that there was any murders.

Unlike this country, he was paid specifically on information that he gave to the Colombian government for specific crimes, specific allegations. He doesn't ever proffer to murders until he sees Mr. Fee 14 years later. I am not saying there is any improprieties. This guy decides to do this 14 years later. This guy didn't go to the government. Mr. Rios Suarez has been in jail since 2010. He knew that. He never came forward and said these murders, but for when we decided to go to trial, two weeks after we decided to go to trial, potentially. I think the Court should take into consideration the 100 months as relevant conduct that he has to serve.

And in Colombia, from what I've been told by the Colombia lawyers, there is no good time. He is going to serve 100 months in Colombia. Whatever sentence he gets here, which we respectfully request should be consistent with his boss, he still has to go to Columbia and serve 100 months.

Mr. Rios Suarez, I don't know him prior to being assigned to this case. He has been very respectful to me and to my entire staff and to my students, as some defendants are and some defendants are not.

But the allegations of the government, just from dealing with him, as the Court will know, I believe, in my opinion, and I could be duped and that's fine. I've been duped before and I will be duped again, but I think these allegations of violence are unfounded. And I believe that they should listen to the members of the FARC that they have proffered and not people who come up with these violent allegations 14, 15 years after cooperating.

With that said, your Honor, we are under the guidelines and, how these cases are prosecuted, we are asking for the lowest sentence possible.

THE COURT: Thank you.

MR. MERINGOLO: Thank you.

THE COURT: Thank you, Mr. Meringolo.

Mr. Fee.

MR. FEE: Your Honor, just briefly. There are a number of statements that I don't think were based on the record in Mr. Meringolo's comments to the Court. I won't go through them detail by detail. I just want to note that's what the record reflects, that we do dispute most of the comments he made. I will just note one.

Your Honor, the government did not accuse this defendant of being a member of the FARC. I think Mr. Ramirez-Pajon may have believed he was during his testimony and that's where Mr. Meringolo gets that from. Our view of the facts is that he aligned himself with the FARC. To our knowledge, he was not, in fact, a member. Thank you.

THE COURT: Mr. Rios Suarez, would you like to address the Court before sentence is imposed?

THE DEFENDANT: Yes, your Honor.

First of all, I would like to apologize to God and also apologize to your Honor for the damage that I've done. However, I would like for your Honor to know that I have never, ever been involved with any murders. I would also like to ask for forgiveness for my family because of the pain and suffering that I have caused them because of not being able to be with them. I will just ask of you, your Honor, and the government of the United States for one more opportunity. May God bless you.

THE COURT: Thank you, Mr. Rios Suarez.

Let me just describe how the Court arrives at its determination as to what is a sufficient but not greater than necessary sentence. I have to consult the guidelines and I have. We have discussed the offense level calculation and the criminal history category.

The Court's sentence is primarily driven by the statute, the federal statute, 3553(a), which asks the Court to look at a number of factors, each of which I have looked at. If I don't recite each and every factor in terms of its magic words now, I want to assure everyone that I always read 3553(a) before every sentencing to make sure that I've actually covered each of its various aspects.

In general, the statute requires the Court look and evaluate the nature and the circumstances of the offense, that it also look at the history and the characteristics of the defendant and ask itself, what is just punishment? What is appropriate punishment? What is punishment which serves the ends of justice for a particular sentence? What kind of sentence promotes respect for the law? What type of sentence actually evaluates appropriately the seriousness of the offense?

And will both do what is necessary in terms of personal deterrence in terms of general deterrence, and in terms of providing a defendant with any needed educational, medical, vocational or correctional treatment that might be appropriate. And I've looked at these and evaluated them. And let me describe the Court's thinking on these factors now.

In terms of the nature and the circumstances of the offense, I do believe that it's difficult to overstate the seriousness of the offense. I'm not going to focus on any violence that was used. I have made those findings by a preponderance of the evidence.

But what I want to focus on is the drug trafficking. The drug trafficking was very significant. It was very large. Mr. Fee has described it. There are only a few defendants who can control as much cocaine as Mr. Rios Suarez was able to control and whose actions impact the United States as directly as his have.

His actions directly brought cocaine, large amounts of cocaine into our communities. There are people who snorted that cocaine, who used that cocaine in a variety of ways, who became addicted to cocaine, who died from cocaine, whose families suffered because of the cocaine, who themselves lost their jobs because of cocaine, who ended up hospitalized because of cocaine. There are nameless people. And those people were on the other end of the dollar transactions or the peso transactions, or whatever denomination of currency was used for those transactions. They were real people. They were people who made a choice perhaps to engage in the taking of cocaine, but they were people.

And our communities are destroyed and their fabric is deteriorated when we have people with such addictions. The addictions themselves are ultimately things which are enabled and assisted by the cocaine which is distributed into our communities and it's the large-scale distribution which provides such a very, very pernicious platform for that. Addictions also lead to crime. They lead to the deterioration of families.

The toll is just enormous. So here we do have a defendant whose actions were quite extensive and whose distribution was quite extensive and where the impact on the United States was very, very serious. This was a way of life for the defendant. He made his choices. And he made his choices in terms of the way in which he chose to make a living, the manner in which he chose to live his life for that number of years prior to his arrests, and he now has to pay the consequences of those choices.

I think Mr. Rios Suarez, by all accounts, in the Court's view, is an intelligent man. I think he understood the consequences. I think he understood the choices he was making. He is in prison and I don't think it's probably much of a surprise that he's in prison, although, he, I'm sure, undoubtedly wishes things turned out differently and he wasn't in prison. That would be a very human emotion.

The defendant, however, finds himself where he is, at the end of this long road, having made these choices, and I am here now to weigh the seriousness of the offense and to determine the appropriate penalty.

The defendant's submission stated that there was no danger to the American public and I want to take issue with that because in an abstract sense of geographic location of the defendant himself, if he were not in American prison, in terms of him, if he were cabined off and not distributing cocaine, I don't disagree. When we have a defendant whose cocaine distribution directly reaches into the United States, he does directly impact and he does directly endanger our communities, and I take that into account. His extraterritorial conduct directly affects the United States.

In terms of the history and characteristics of this defendant, he is a family man. I have no doubt that just like a lot of people, like a lot of criminals, he is a complicated man. I am sure he loves his children, loves the people, his family, the people that are close to him, the people that wrote letters.

The fact that he has committed these crimes does not mean that he is a person without the ability to love and to have those kinds of very important human relationships, and that's a statement of the tragedy that this crime has resulted in. It's a crime that has tragic consequences for so many people, including, while by his own personal choice, for the defendant himself. The conduct here was his chosen profession, and I've taken that into consideration as well as the fact that he had a family because he knew he was putting his own liberty at risk in the manner in which he chose to commit the crime.

I do believe that if he were free today, I think he would return to that conduct. I don't think he would not do the acts which he has done before. I think that he today would return to drug dealing if he could. If his contacts were still available, if he could find the same resources to do what he had done before, I think he would do it again. There is nothing in the record that suggests that he would not.

I have taken all of this into consideration as well as the comments I made in terms of the various enhancements, in terms of his role, in terms of his participation over time in the criminal enterprise. Long-term pattern of criminal activity is what I mean.

I then ask myself, with all that we said this afternoon in this now rather lengthy session, what is just punishment. I want to note now a couple of things. It's important to say how I have treated things like the Colombian conviction, his prior time, his extradition letter.

In terms of the Colombian conviction in 2010, which has led to the imposition of another sentence, I don't have any facts that allow me to test that conviction. I can't test to what extent it, in fact, overlaps.

But, in any event, it is not time that has been served. It is time to be served. And I don't have anything which indicates to me that there are no appeals left, that there are no leniency applications which could be applied for in Colombia at the termination of the defendant's term here.

Therefore, I decline to include facts relating to that Colombian conviction and relevant conduct, and I decline to find that the sentence here should run concurrently. I leave it to the defendant and his legal counsel in Colombia to make any appropriate applications to the Colombian court a number of years from now as to how that should be treated.

In terms of the unwarranted sentencing disparities, there were four. The Court found the facts that it finds on all four. They were all really quite different.

In U.S. v. Lopez and Metallo -- hold on. That's different from the four that were mentioned by Mr. Meringolo. There was Phanor-Arizabaleta. He wasn't similarly situated. He served a short period of time, but he had a heart problem, and then he was going to go serve 20 years in Colombia and he also happened to be 70 years old. Then Cabrera Cuervas. She didn't have all of the enhancements, as this defendant, not by a long shot. She served 200 months or was sentenced to 200 months. Leal Garcia, he also didn't have all the enhancements. I do note that he was sentenced -- many of his codefendants were sentenced up to 29 years.

Here the defense itself asked for I think 20 years. But he didn't have all of the enhancements and we looked through the records there. For Ramirez, he was a government cooperator, and so he had a 5K that affected him. I don't think that the Court's sentence should be based upon those sentences. I would note that the guidelines are to provide some guidance as to reducing unwarranted sentencing disparities. They provide some guidance in that regard, although the Court ultimately looks to 3553(a).

In terms of the extradition letter, the Court did receive a letter dated January 31, 2014 from the Colombian consulate general that references assurances that the United States Government provide in connection with the extradition of this defendant. It states that, among the assurances, that this defendant shall not be sentenced to life imprisonment. However, I would argue that the case law is different than that from which Mr. Meringolo cites. I think he makes that a statement in terms of spirit of the letter.

The defendant argues, effectively, that a term of years that would equal life would be contrary to the spirit of the letter and also that the Colombian life expectancy for a male is 58 years. Since the defendant is 46, it would resulting in something less than 12 years. Therefore, all of that should be taken into account.

I actually disagree with Mr. Meringolo's reading of these various matters. I note that I've carefully considered the extradition letter. I do note the substantial comity issues involved and implicated. I have looked at the case law in this area. There are situations in which this type of letter was similar, but not precisely the same. It has already been exactly argued on exactly these points, which is, does the imposition of a sentence which determines a number of years, but which is lengthy, then one could argue equates to an effective life sentence, does that violate the terms of the extradition letter. And the answer by the Second Circuit has been no.

Indeed, in one case Judge Scheindlin actually imposed a life sentence and pronounced it as life. And while the Second Circuit indicated that perhaps there should have been additional statements relating to the comity issues, they upheld it as not an abuse of discretion. I cite the U.S. v. Baez case at 349 F.3d 90, pin cite 92 to 93 in that regard.

My sentence will reflect my careful consideration and balancing of the comity issues as well as due deference to the assurances given by the U.S. Government, but I am ultimately I'm guided by my obligations as a judge in a separate branch of government and the factors of 3553(a).

Finally, let me address the time served awaiting extradition. I wanted to know, did he fight extradition?

MR. FEE: Yes, your Honor. He opposed it and appealed the decision.

THE COURT: Then I decline to make a recommendation one way or the other for the Bureau of Prisons in that regard. I will let the Bureau of Prisons figure out if they are going to give any time.

Ultimately, the determination as to time credit is a BOP determination. I would say, however, that it's a factor against getting credit if you've actually fought the extradition to use the conditions of confinement as a basis for getting credit. If you're in a four-by-four windowless cell that's got terrible conditions, you think you wouldn't fight extradition quite so hard. In any event, that was a decision that was made by the defendant. He had the right to avail himself of the appropriate legal processes available in Colombia in that regard. But I declined under such circumstances to state whether or not credit should be given.

With all of this said and all of these points made, I am now ready to impose sentence. I would ask you to please stand, Mr. Rios Suarez.

Mr. Rios Suarez, it is my determination, as a federal judge sitting in the Southern District of New York, based upon my consideration of all of the factors set forth in 3553(a), that you be sentenced to a term of years of 54 years. 54 years will equate to a term of months, that is, I think I've got to do the math, but it's 54 years. We will do the term in months. This sentence is sufficient but not greater than necessary to achieve the various purposes of 3553(a).

In the Court's view, while I acknowledge it is effectively a life sentence, I am not pronouncing a life sentence. It's 648 months. I'm not pronouncing a life sentence. And this defendant has the ability to appeal, and various appeals may reduce the sentence by way of enhancement reductions. But, in any event, the Court does believe that a 54-year sentence is the appropriate sentence for this defendant.

I also note that the Colombia consulate general knew from various cases that it was possible that such a result could have occurred, because it has occurred in the past, exactly this kind of issue with respect to the extradition letter, and the consulate general could have written a different kind of letter which would have said that there could not have been an effective life sentence. And that is the U.S. v. Lopez and Metallo case, 305 Fed. App. 818 at 819. That is my determination as a determinate sentence of 648 months.

You may be seated, sir.

The Court also declines to impose a period of supervised release because this defendant will be deported following his term of incarceration. There will be a special assessment of $100 and the Court does impose a fine of $1 million, which covers the cost of prosecution as well as the cost of confinement, as well as a monetary penalty. It is up to the government to find a way to collect that, but based upon the evidence provided, there should be resources someplace that would support such a fine.

The defendant is also required to forfeit any property or proceeds traceable to the offense, if any. I don't know if there are any that are findable or obtainable. There are no identifiable victims and, therefore, no order of restitution.

Do counsel have any legal or other reason why sentence should not be imposed as stated?

MR. FEE: No, your Honor.

MR. MERINGOLO: No, your Honor.

THE COURT: I do order that sentence be imposed as stated.

Are there any open counts? There wouldn't be. He pled to the indictment.

MR. FEE: Yes, your Honor.

THE COURT: Mr. Rios Suarez, you have a right to appeal. Any notice of appeal must be filed within 14 days of the filing of the judgment of conviction in this matter. If you can't afford the cost of appeal, you can apply to have those costs waived by applying to proceed in forma pauperis.

Are there any other applications?

MR. FEE: Not from the government, your Honor.

MR. MERINGOLO: Nothing from the defense, your Honor.

THE COURT: We are adjourned. Thank you.

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